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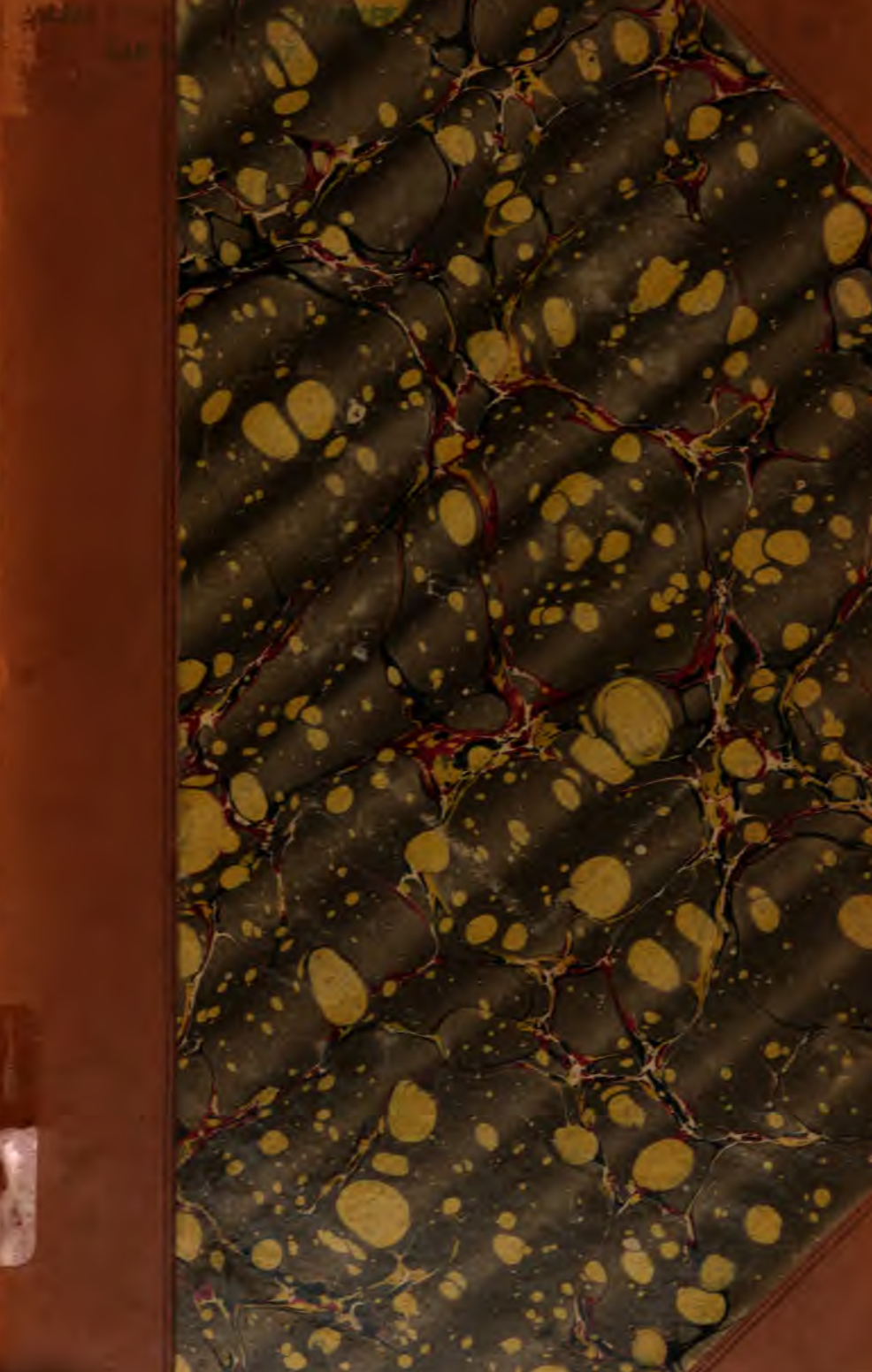
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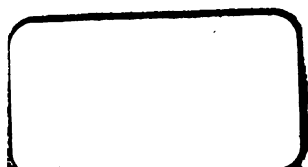
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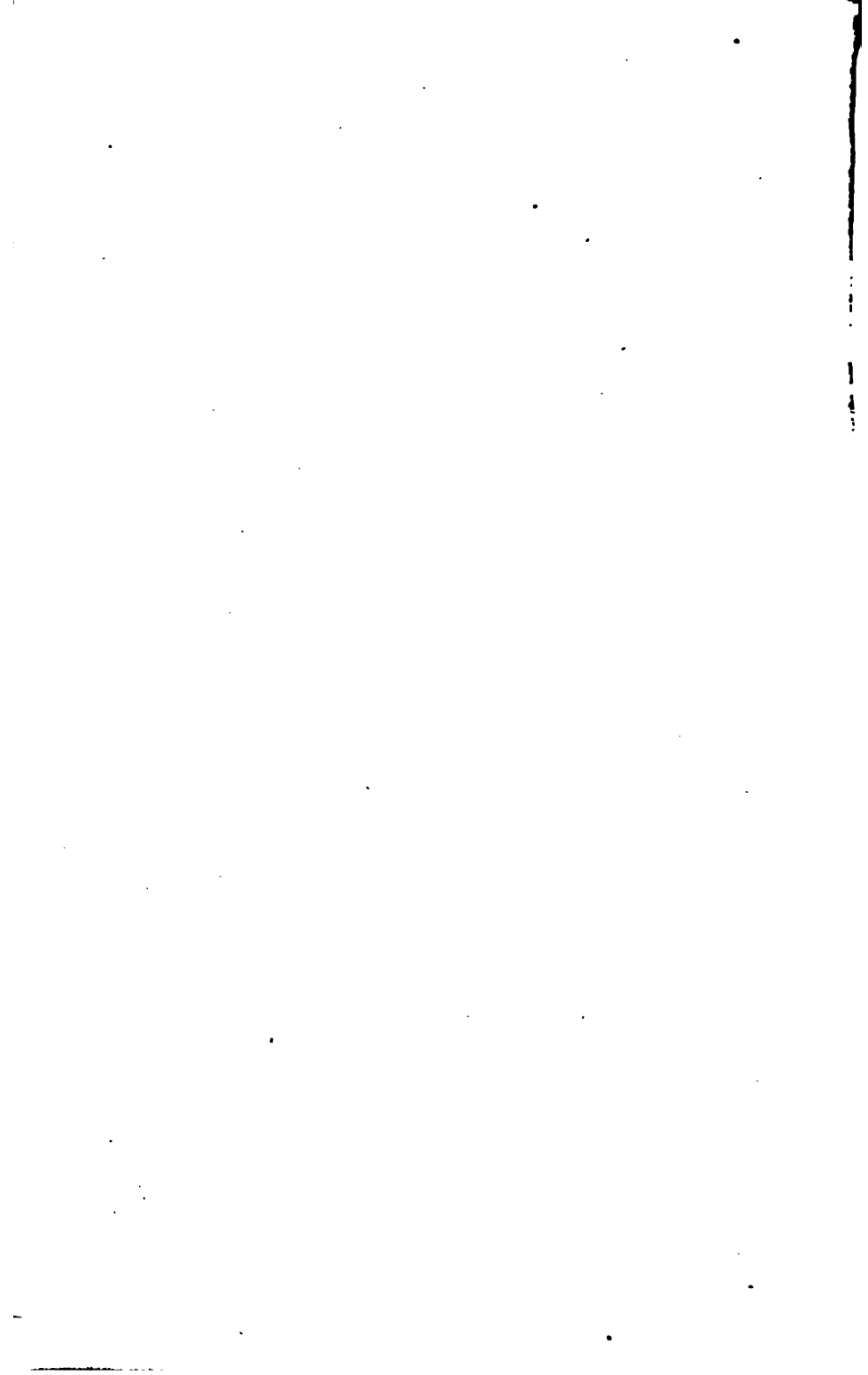
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THE LAW REVIEW.

ART. I. — LAND MEASURES FOR IRELAND.

AT last we have the gratification of thinking that the importance of measures relating to land is properly appreciated in connection with the government of Ireland. "What is a matter of urgent expediency in England becomes in Ireland a matter of necessity."¹ This was the conclusion to which we came in February 1847, and we have endeavoured since that period to present the subject to our readers with the prominence which it demands.

"Have one common title registered in the local courts at a cheap rate, and let every party purchasing refer to that simple title; without this, or some similar simple machinery, for the transfer of real property, you will never effect the object of this resolution, so highly important to the community."

This was a part of the speech of an Irish gentleman, at a meeting held on the 12th January 1847, of Irish landholders of all parties, and how was it to be effected?

"Surely there never existed a better case than now exists for appointing a temporary commission."²

And shortly afterwards, in allusion to the first Irish Incumbered Estates Bill, we said³, —

"We have another apprehension connected with this bill;— that as it is to be practically worked out in the Master's Office, the just odium which rests on that office, as well in Ireland as in England, will deter persons from availing themselves of its provisions. All persons acquainted with Irish titles must know how

¹ 5 L. R. p. 398.

² 5 L. R. 417.

³ 6 L. R. 167.

many persons having interests and incumbrances would have to attend in the Master's Office on most inquiries and subsequent proceedings under the act, and it is deplorable to consider how many would thus suffer. Would it not be better to call in the aid of some extraordinary tribunal, to deal with the cases likely to arise under this act, as was done, with such success, under the 'West India Slavery Compensation Act.' If these alterations are not made, we very much fear that this Bill will share a fate similar to many other Irish bills,—that of being found in the statute book, but heard of nowhere else."

That bill was afterwards withdrawn. "Still the necessity for legislation remains and will press on the government more closely than ever, *when the new Irish Poor Law comes into operation, and then those great questions relating to the transfer of property which stand ready for decision, must be forced on the public mind.*"¹

The Irish Incumbered Estates Bill was renewed in the session 1848; and in last May, we thought it necessary to make the following remarks:—

"In the present crisis extraordinary remedies are required. The ordinary rules are violated to their utmost extent by the clause in the bill which says that when the Master has directed a sale, the purchaser under it shall hold the land against all the world, and yet this is the only good and really useful clause in the bill; let the government only render this clause effectual, by granting a competent machinery to work it out, and they will bestow an inestimable boon upon Ireland. Render all future titles secure, and provide for the easy transmission of land so assured. Say that, after a certain day, all the land which has undergone the necessary process shall be free land, so far as past incumbrances are concerned, and you will give this country a chance of righting herself.

"Add to this a special tribunal for the occasion, which will look not to technical, but substantial justice, which will employ in the investigation of the matters brought before it some of the native Irish shrewdness, which being acquainted with legal and equitable principles, will seek only to get at the marrow of each case, and will know how to act accordingly; which, not wanting in professional knowledge, shall be assisted, or if necessary controlled,

by lay common sense. Let such a tribunal be formed, and we will not only insure it plenty of business, but we will answer for its disposing of it satisfactorily.

"Such a land-tribunal is really the great present want of Ireland. Not only could it deal satisfactorily with the sale of incumbered estates, but there are at least two other important matters which could safely be intrusted to it. The conversion of renewable estates for lives, and in certain cases long leaseholds,^f into perpetuity, has been long demanded; and the whole question of tenant-right might also properly be referred to such a tribunal. Neither of these questions could properly be dealt with by the ordinary jurisdictions of the country. They require special remedies. The bare appointment of a tribunal for dealing with these matters would go far to assist their satisfactory adjustment. This tribunal would in fact be the safest adviser as to farther and more complete legislation."¹

The bill, however, passed into law, and no such tribunal was entrusted with carrying it into operation; we will not say that this is the reason that it has turned out a failure. It has in fact been overlayed by too much care. Let us see what the Irish Master of the Rolls says in one of the very few cases that have occurred under it, and let our readers judge, after reading this opinion, whether we have said one word too much respecting the evils of the Court of Chancery as connected with working the measure.

The Master of the Rolls (Jan. 12. 1849) in a case under the Irish Incumbered Estates Act, said

"I wish it to be understood that I shall not sanction or permit the abuse which has grown up as to equity pleadings, to be applied to cases under the 'Incumbered Estates Act.' Every deed set out in such a petition must be abstracted with as much conciseness as is consistent with clearness; and, as I shall have to read over every petition, I shall either adopt the course of dismissing prolix petitions without prejudice to presenting petitions in proper form, or I shall make such order as to costs as shall *prevent such a document as the petition in this matter from being again presented.* The petitioner must take care, in carrying on the prosecution before the Master, that no unnecessary expense shall be incurred. The Master under the proposed given orders will have to state the

¹ 8 L. R. 230.

number and dates of the meeting before him, and I shall be able to form a judgment when the case comes into court, whether the case has been fairly conducted in the office, or whether it has been carried on with the view of accumulating costs."

This surely holds out a melancholy prospect for the poor landowner. Were we not right then when we said, that it would be impossible to work this measure advantageously in the Court of Chancery. Said we not truly in November last¹, that, "an independent tribunal for carrying this act into operation must be created, whose duty it will be to explain and simplify its operation; *to regulate the sale of land coming within its jurisdiction*, but more than anything else, not only to reduce the professional expenses connected with the working of the act, *but to override and controul legal subtleties, which are already beginning to settle upon this act, and which will, if left alone, destroy its beneficial operation.*"²

And thus we went peddling on. Let us rejoice then that there is now some hope not only of a fair trial being given to such a tribunal, but that a measure far more comprehensive than any that came into our minds is propounded. On the 5th of March, Sir Robert Peel brought forward, with all that power of statement which renders him the master of the House of Commons, a plan for the government of Ireland. Let us give it as far as we are able in his own words³: —

"It is not without hesitation I venture to offer any suggestion.

¹ 9 L. R. 187.

² As some further evidence of this, see copy of case and opinion under the act 11 & 12 Vict. c. 48., printed by Mr. P. Mahony (Dublin, Hodges and South), which shows the cumbrous nature of the machinery of this court, and its impracticable nature. The opinion of counsel thus concludes: — "It was with a view towards remedying this social evil, and to relieve incumbancers and owners of embarrassed estates, that the Act of last session was originally framed. Although that act will fall far short of conferring the important benefits which appear to have been contemplated, it is to be hoped that those benefits may be soon conferred to the fullest extent, by an Act of Parliament, properly framed for the purpose of effecting cheap and expeditious transfers of incumbered estates, and thus preserving or withdrawing them from the management of Courts of Equity."

³ It were much to be wished that this and the subsequent speech had been published in an authentic form; as it is, we have endeavoured to verify the authorities referred to,

for diminishing the danger which I see in perspective; but I will communicate to the house what my impressions are. Almost the only thing in which I see a hope of safety, is the introduction of new proprietors, who shall take possession of land in Ireland, freed from its present encumbrances, and enter upon its cultivation with new feelings, and inspired by new hopes. I wish for no violation of the rights of property. Nothing can be more easy than to suggest remedies, if we choose to disregard the rights of property, which it is the first duty of a British Legislature to uphold. But at the same time much property in Ireland is, in point of fact, now of little value to the proprietors, on account of the encumbrances upon it; and I cannot help thinking that it is possible for the Government, with the sanction of the house, by taking an enlarged view of the subject, to devise some means by which new capital may be introduced into the cultivation of the land in Ireland, and the existing proprietors rescued from the disappointment and despair in which they are involved. Suppose you raise a million in Ireland by the rate-in-aid—that England contributes another million—how do you mean to apply the money to rescue Ireland from her difficulties? Do you mean to let things go on in the present course? Do you mean to rely on the potato? Will you again run the risk of doing so? Before doing so, is it not your duty to consider every means by which a better state of things may be introduced into Ireland? I revert to a period when a state of things existed in Ireland not very different from that which now exists there,—I allude to the reign of James I., when the settlement of Ulster took place. At that time a large quantity of land was forfeited in six counties of Ireland, but not so large a quantity as, I believe, might now be obtained in the west of Ireland by an arrangement with the proprietors—an arrangement devoid of injustice, to which no objection would be made. The lands forfeited after the rebellion of Tyrone, in the counties of Donegal, Tyrone, Derry, Fermanagh, Cavan, and Armagh, amounted to 500,000 acres. The transaction is described in nearly the same manner by all contemporary historians, but I think the best account is to be found in Carte's *Life of Ormonde*.¹ That author says, that ‘These counties had suffered exceedingly in the war, and were reduced to a very desolate condition. The country was full of woods and fastnesses, which, on favourable junctures, would give encouragement to rebels, and at all times serve as a retreat to robbers. Great numbers of the inhabitants had perished

¹ Vol. i. pp. 14. et seq.

by the sword—much greater by famine; the rest were reduced to so extreme a poverty that they were not able, if willing, to manure the ground; so that the lands laid waste in the course of troubles were likely to continue so in time of peace.’

‘This description, excepting that part which refers to woods and forests, affording shelter to robbers, is very applicable to the state of Connaught, and many parts of the west of Ireland. Sir Arthur Chichester was the Lord-Deputy at the period in question. He caused surveys to be taken, and it was decided that the lands to be planted should be divided into three proportions of 2,000, 1,500, and 1,000 English acres, and these escheated lands were disposed of to 104 English and Scotch undertakers, 56 servitors, and 286 natives, all of whom gave bond to the Government for the performance of covenants.¹ The Lord-Deputy caused a parochial church to be erected, and a glebe set out according to the size of the parish for each incumbent. The plantation was extended to Leinster. Great injustice was done to individuals by this proceeding; but, says Carte², ‘The grievances of particular persons did not prevent the general good intended to the kingdom, by these plantations. In consequence of which lands were cultivated and greatly improved, towns and villages built, trade and commerce carried on and extended. The people in general, weaned gradually from their former idle and disorderly life, began to learn and practise civility, to apply themselves to business, to use labour and industry in their several stations, and to relish the sweets of peace.’

‘If it be possible to make any new settlement similar to that of Ulster, my earnest advice, which I am sure will be in unison with the universal feelings of the house, is, that no religious distinctions should be allowed to enter into the arrangement. It may, perhaps, be impossible to apply the principle of the arrangement to the extent to which it was carried in James I.’s time, but unless it be applied to some degree there is no hope of the future improvement of Ireland. If, after raising a rate in aid, you leave matters exactly as you found them—if you rely exclusively on grants of public money, there is no hope of permanent escape from the calamity which afflicts us; but if, without violating the rights of property, you place the land in possession of new pro-

¹ By these covenants, among other things, alienation was restrained. Carte, vol. i. pp. 17. 24. This appears to be partially favoured by Lord Bacon, Works, vol. v. p. 184. ed. Mont.

² Vol. i. p. 25.

proprietors without distinction of religious profession, you will lay the foundation of the future prosperity of Ireland. An act was passed last session to give facilities to the acquisition of property in Ireland, but I fear that in consequence of the alterations introduced into the measure in the Lords, its object of introducing new proprietors into Ireland will be defeated. I offer any suggestion with the utmost hesitation. I have no party motive whatever in this question. I make every allowance for the situation in which the Government is placed, by the failure for the last four or five years of the crop upon which the people relied; but I feel this most strongly, that if we are content to vote money, or give a rate-in-aid extending over the whole of Ireland, or to trust to the potato, and to the present distribution of property, finding property so encumbered and in so hopeless a condition, that thousands of acres are thrown out of cultivation, with no prospect of being cultivated, then at the expiration of the two years for which this rate is to be granted the state of Ireland will be no better than it is now. I very much fear that, if you rely merely on individual purchases, you will make no great advance. It appears to me it might be prudent to appoint some commission for the purpose of considering the whole subject, and the possibility, by their advice and intervention, of effecting the change in property which I believe to be indispensable to any great improvement of that country. If you choose to leave the present proprietors in possession of their property, hardly receiving a nominal rent, encumbered with debt, with every discouragement to exertion, and so overwhelmed with rates that it is impossible to find a purchaser or occupant, then I see no hope for the salvation of Ireland. But if, through the Government or Parliament, you can establish some intermediate agent to get possession of that property on equitable terms, and then can arrange for the re-distribution of it, I should see some hope of her salvation. I would do injustice to no man, but I would try the intervention of a competent authority, acting with the sanction of the Government and with the Government, to take a comprehensive view of the condition of the whole of these unions, and to attempt to suggest means by which there should be that transfer of landed property which I believe to be the root of improvement in Ireland. Despair is overwhelming the proprietors. The sixpenny rate is merely to administer relief to some of the unions. I object to a pecuniary burden which would discourage either the occupant or the purchaser. You see what was done in Ireland in the reign of James I. with 500,000 acres in Ulster, the

refuge of robbers and assassins—the division of property, the allotment into districts of 2000, 1500, and 1000 acres. Unless you can give some guarantee as to the poor-rate, you will have no purchaser. I earnestly advise you, then, to consider whether you cannot, by the intervention of some such commission as that I have mentioned, facilitate the arrangements for the transfer of property. I have read the rules of the Court of Chancery—I dare say they may be very proper, but every one would say, ‘If you can give me only a nominal guarantee of 10 per cent. for my outlay I will go anywhere else.’ Cannot you assist by the intervention of a commission composed of men of the highest character? Surely you could find men who would gratuitously devote their time to rescue Ireland from this state—who would be the medium between the proprietor and the purchaser? The condition of 20 of these unions is so wretched, that you find yourselves either unable to trust the local guardians, or that they are throwing up their appointments and you are trusting to vice-guardians to administer the Poor Law in those districts. *Would it not be possible, by the intervention of some such commission as that I have spoken of, to assist in solving the legal difficulties, to consider what arrangements should be made for the transfer of property, to suggest the mode in which it could be effected, giving hereafter a title that should not be liable to question, seeking the aid of parliament for that purpose, confirming the title in some shape or other, limiting the amount of charge on account of the poor-rates to which those lands should be subject, giving a guarantee, as far as you can, against any violation of property, and also against legal disturbance on account of flaws in the title?*

“Suppose I had an intelligent commissioner by whose intervention property might pass into the hands of proprietors who would employ those men in the improvement of the estate—and I believe that, in the district of Connemara, there are valleys as fertile as in any other part of Ireland—if, I say, I could appoint an intelligent and able commissioner who, for a time, would take possession of that property,—who would open means of communication,—who would, if you please, divide it, giving security for ten or fourteen years to come that the amount of poor rates should not be exceeded, and calling into action the labour of those men, then I am laying the foundation of future prosperity, introducing new men into the country, and avoiding that which, I think, was a fatal defect in the act of James I., namely, the establishment of a religious distinction. In that way I would infuse new blood into

Ireland, new enterprise, and a new division of property; and I would give a stimulus to industry by guaranteeing the future proprietor against being sunk and overwhelmed by the amount of the poor-rates. I see no other mode than some measure of that kind that could be adopted to mitigate the present evil. I greatly doubt whether, under the bill of last session, any amount of property has been sold. I greatly doubt whether you must not have some intermediate authority between the present proprietors and the new purchasers. It was a curious thing that when James I. determined upon the settlement of Ulster, he asked the opinion of the highest authority. He went to Lord Bacon, who, although he knew nothing about Ireland, wrote a treatise on the plantations in that country, which, on account of his prophetic sagacity, is well worth the consideration of the present enlightened race of men, with their present means of knowledge. James I. was dealing with only 500,000 acres. If you delay you will have more. The population is not diminishing—the fisheries are not worked; hope is paralysed—the people are relying on a wretched subsistence of an eleemosynary nature. Take care that the grant of this charitable aid does not paralyse all exertions. It may be unavoidable, but there is a great evil that when you make the people rely on that aid you are diminishing their sense of independence. Lord Bacon was consulted by James I. as to the best mode of meeting the difficulty, and he thereupon wrote a treatise, in which, as might be expected, there are many most extravagant and fulsome compliments to the sagacity of James I., and some ridiculous proposals; but, upon the whole, he makes some most valuable suggestions.¹ He says—and he might have been writing for the present time—‘Of all things a commission is most necessary both to direct and to appease controversies and the like.’ That is, he would not trust to the vice-guardians that you have, acting in divided parishes, without concert, struggling against great difficulty, doing all they can, but still not enough. ‘The commissioners shall for certain times reside in some habitable town in Ireland, near to the country where the plantation shall be.’ Then he foresees that the Secretary of State would say, ‘We need not have a commission for the purpose. There is a capital Privy Council in Ireland, and let it go to them.’ But Lord Bacon, with the habitual sagacity of a man in office, saw that that answer might

¹ See his works, vol. v. pp. 169—185. This was in 1606, when Bacon was Solicitor-General.

be made to him, and he therefore went on to say—‘When I speak of a council of plantation, I mean some persons chosen by way of reference on whom the labour may rest. For, although your Majesty have a grave and sufficient council in Ireland, yet that supplies not the purpose whereof I speak. It will give greater expedition, and some better perfection in the directions and resolutions of the matters may be considered aforschand by such as may have a continual care of the cause.’ I cannot help thinking that if you advise the crown to select persons to meet this peculiar difficulty by surveying the whole of these unions, devising the best means of effecting the transfer of property consistently with equity and justice, giving the future proprietors of property a security against an unlimited demand on account of poor-rates, and at the same time employing the able-bodied men in Ireland, so long as that necessity exists, in making roads through inaccessible districts, and cultivating that land which is now thrown out of cultivation, you will be doing much better than if you vote unlimited sums of money, leaving them to be distributed by guardians not acting in concert, and trust that the potato crop of the next year may be better than it has been for the last two or three years. Again I say the main hope of the improvement of Ireland is the transfer of property by means perfectly consistent with justice; for no consideration ought to tempt you to violate for one moment the principles of justice or equity. But in the present condition to which a great part of the west of Ireland is reduced, I see no other hope than that of the transfer of property to other hands through the intervention of Government, or some commission acting in concert with the Government, taking an enlarged view of the subject. The west of Ireland affords opportunities for improvement which, speaking comparatively, no other part of the world appears to give. I see a great world grown up on the other side of the Atlantic; I see the facilities of communication by railways and by steam. I see every reason why Ireland, if her position in respect to tenure could be improved, should be most prosperous. If you leave her as she lies she is overwhelmed with poverty and despair. But now, by a vigorous effort, in which every part of the empire shall join, it appears to me that there are opportunities, by a new constitution of property, by inviting with the aid of the government new capital to be invested in the cultivation of the soil—it appears to me that you have opportunities of materially improving her condition, and, if you succeed, of extracting from her present state of calamity and

wretchedness the means of future prosperity and happiness for herself and of strength to this united empire."

And on the 30th of March Sir R. Peel entered into further explanations.

"In my opinion all these measures on examination will be ineffectual—all your measures of drainage, of local improvement, of increase of fisheries, of emigration,—all will be ineffectual, unless you can cure in some way or other those monstrous evils which arise out of that condition of landed property to which I adverted the other night. If those estates producing 800,000*l.*, with arrears annually accumulating, are not to allow more than 2,000*l.* to be applied to the permanent improvement of the land,—if there are certain principles and forms of equity sanctioned by the Court of Chancery which throw obstacles in the way of any improvement in that respect, you may feel assured that all your other exertions will be ineffectual. I think it would be an inestimable advantage to every insolvent—and to every nominal owner, and to every encumbrancer who is receiving nothing—that it would, in short, be an advantage to everybody except the receivers under the Court of Chancery and the lawyers who are dividing the sums received from these estates amongst themselves, if by some process which should not be inconsistent with the principles of equity and of fair dealing you could relieve those estates from the control of the Court of Chancery, and permit them to be possessed by men of capital who would embark in their cultivation with new hopes and fresh vigour. In my opinion you would do more by that act for the advancement of Ireland than by any other that can at present be adopted. I will just contrast with the hopeless condition of some parts of Ireland,—hopeless on account of the extent of these encumbrances,—the case of an estate, an account of which I have before me in a letter which I will read to the house. It is a letter from a very humble man, giving an account of what he has done in Ireland, although having no connections in that country, and undertaking a settlement in a remote part of Ireland, but bringing capital enough for the cultivation of the land. It is written in a simple style; but if you will devise measures to enable persons to follow, safely and securely, the cultivation of land in Ireland, you may judge what may be done from the plain relation contained in this statement. I received it from a Lancashire man. It is dated the 23d of March, and he is giving an account of an undertaking to which he had been a party on the west coast

of Ireland. 'He had taken on perpetuity a lease on the west coast of Ireland.' Well, I am recommending that you should give facilities to men to obtain a permanent interest in the land. Well, he says, — 'He had taken on perpetuity a lease on the west coast of Ireland. He had planted four of his sons there. To encourage habits of industry one is buying all the stockings brought to him to send to England; another has purchased a hooker of 25 tons, and is endeavouring to encourage fishing on the coast; another was employing upwards of 100 labourers daily last year, but on account of being heavily taxed for his improvements, turned them off with the exception of 10 or 12. From the fourth he sends a letter addressed to himself, dated the 16th of March, 1849.' This is the account which his son gives of his proceedings in this adventure in a part of Ireland which we suppose to be so wild and savage that it is impossible to live in it with any profit or advantage. He says, — 'The more I see, the more am I convinced that this country has the best prospects of any place I know of. There is every desideratum for the enjoyment of a contented and prosperous life.' He is writing this in the midst of all the misery surrounding him: — 'I see no reason why persons should not support themselves entirely upon the produce of their land here. Of beef, mutton, pork, an almost inexhaustible supply can always be had. Flour, oatmeal, &c., should all come from off the farm. A chandler's bill should never be known, for we have already manufactured more than a winter month's supply from the slender means we had. In fact, I think that rent, groceries, with some extras for clothing, &c., should be the only expenditure of a person in this country, when once properly settled. For the yearly sum of 5*l*. enough fuel may be obtained, even to superfluity; and, as for vegetables, any plant that comes under that denomination will flourish here with ordinary care.' Well, contrast this man's exertions with that estate yielding 10,500*l*., and which, out of 100,000*l*. received, had paid only 600*l*. towards its permanent improvement, and then I ask which is the best means of increasing the agricultural prosperity of a country, — to permit an estate to be cultivated under a management like this man's, or to be under the management of the Court of Chancery? I mentioned before the management of property to a certain extent by the commission to which I have alluded. Now, no man has less confidence than I have in the economy of an undertaking on the part of a Government. So far from advising this commission entering upon the employment of unprofitable labour, I think it ought to have for its

main object the reverting to the principle of the bill of 1838, and make the workhouse a test of destitution in Ireland. I cannot believe that there can be any other effectual test. I have not the slightest confidence in a labour rate. I certainly have confidence in encouraging local improvement where there is productive labour; but I have not the least confidence in making labour the test of destitution; and I believe that if all the funds of Great Britain were applied to support the destitute in Ireland, upon your attaching labour as a condition of relief, that you would do the greatest mischief to Ireland; that your test would not be effective, but that there would be such an interference with the ordinary labour market as to involve all in one common state of destitution. But, seeing what difficulties you have to encounter in effecting the substitution of a cereal crop for the potato crop, I cannot say that I should be altogether against such an undertaking by way of setting an example of what an improved method of agriculture can do. I am told that the Lord-Lieutenant has done great good by encouraging the delivery of lectures on the subject. Why not do it on a greater scale? Why not on a limited scale set an example of an improved system of management? There are in one union 4,000 able-bodied paupers—now, if I had 4,000 able-bodied men, and if I could employ them to open a road to an inaccessible part of the country, I think it would be better than to make them break stones. I admit most distinctly that there is no test you can rely upon except the workhouse test, but certainly I would not exclude altogether, supposing such a local commission as I have suggested were appointed, the cultivation of an estate for the purpose of serving as an example to the people what was the best mode of substituting a corn for a potato crop. Some hon. gentlemen say they never heard of such a thing, and they ridicule the idea of managing estates by a Government commission. But what did you do in the case of the forfeited estates after the rebellion of 1745? You took the whole of the forfeited estates after that rebellion, and you appointed a commission for their management. I think that it was a cumbrous commission. Probably their duties were too much for them. The members consisted of a different class of persons from that which I would recommend to be employed for the management of estates in Ireland. But the principle of that act was a most wise one. Those estates were subject to heavy encumbrances. It was not a case of a simple forfeiture of estates, and the Crown taking unencumbered possession. The estates were subject to heavy mortgages and other charges. The

trustees were directed to pay off the mortgages and the other burdens; and they were instructed to manage the estates as satisfactorily as possible. The act under which this was done is the 25th of George 2, chap. 41. (1752), and is entitled 'An Act for annexing certain forfeited estates to the Crown inalienably, and for making satisfaction to the lawful creditors thereupon, and to establish a method of managing the same, and applying the rents and profits thereof to the better civilizing and improving the Highlands of Scotland, and preventing disorders there for the future.' That act provided, first, for the satisfaction of the creditors, so far only as the value of such lands. It next empowered the commissioners to grant leases, and, where estates comprehended whole parishes, to divide the same into more parishes, and grant competent provision to the new ministers. It also authorized the Crown to erect schools on the said estates for instructing young persons in reading and writing, and in the several branches of agriculture and manufacture, and to supply schools with the materials for agriculture and manufactures, and for the raising of flax. Now, I should not at all object to schools being established in the west of Ireland for the purpose of instructing the youth in agriculture, nor would I think the encouragement of the raising of flax an undesirable object. But the question which I am at present considering is whether such a commission can be instrumental in promoting the transference of property. I would advise no rash proceeding in this respect. *I see no advantage in throwing into the market an immense quantity of property, even if it could be disposed of. I think that the throwing of a great quantity of property simultaneously into the market would inevitably have the effect of depressing the market. I would therefore advise the recourse to no such proceeding.* But the question is whether such a commission would not facilitate the voluntary transference of property. Last year you admitted the principle. You passed an act for the purpose of promoting the transference of encumbered estates. By that act you gave power to the owners of such estates to sell, and you gave power to a single encumbrancer to sell, with the consent of the Court of Chancery — you admitted the advantage of such a system as I am now advocating; but what I greatly fear is that the mechanism of your act was so cumbrous that it will not be able to effect your design. Since you have decided, then, upon the principle that the retention of many of those estates is of no advantage to the owners, that they are of no advantage to the encumbrancers, that they are a positive evil with respect to the solvent proprietors in

their neighbourhood, and that they are prejudicial to the public interest, what I now recommend you to consider is, whether you ought not still further to facilitate the voluntary transfer of encumbered estates; for I am convinced that if you rely upon the cumbrous process of the Court of Chancery, you will not give effect to your own design."

And now let the reader observe what this great statesman says of the Court of Chancery; and let us ask how long after this the Chancery jurisdiction can remain unreformed, and how many such speeches will be required to give it its *coup de grace*.

"I know that I am rendering myself liable to the charge of meddling with the established rights of property—I know it may be said that unprofessional men in their attempts to secure the advantages of the introduction of new capital into the country are apt to disregard vested interests. But I wish to confine myself, as far as possible, within the limits sanctioned by the highest equity lawyers. I am speaking now of the principle. It was said by the present Lord Chancellor (Cottenham)—and I could not name a judge that ever sat in the Court of Chancery of higher authority in matters relating to the principles of equity jurisdiction,—the Lord Chancellor, with respect to the principle of facilitating the transference of Irish estates, said,—

"‘Unfortunately for Ireland, the landed property there, to a large extent, was in a situation not only detrimental to those who had an interest in the land, but also most injurious to the community at large. A very large portion of it was heavily encumbered by mortgages, charges, and other interests; so that the ostensible owner could hardly be said to have any estate in the land at all. When a man was really the owner of an estate, he had both the means and the motive for improving it; but it was impossible for a landlord whose income arising from his landed estate was intercepted by mortgages and other charges to discharge those duties which a landlord should discharge. This was a most infamous state of things.’

Another Lord Chancellor—an Irish Lord Chancellor (Lord Campbell), speaking of the tenure of Irish property, said,—

"‘Titles in Ireland were in a most deplorable condition. In Ireland the registers were exceedingly bad, and instead of clearing up titles, and making them more certain, often involved them in inextricable confusion.’

Lord Langdale, the Master of the Rolls, said ¹,—

“The interference in such a case as the present is of the same sort and character as all the other legislative interferences with private property for public purposes, and because this interference is intended to secure the payment of debts, or the performance of private obligation, which would not otherwise be performed, it is not more, but somewhat less, objectionable than the interference with private property and contract which is authorised by acts for railways, docks, or other public works.”

Now, the principle which all those high legal authorities contend for is, that you may, without violation of any equity rule, promote the transference of this property. You attempted that, as I have said, last session, but I very much fear that the bill then passed will not be effectual, and my fears are confirmed by what was stated at the time by the Master of the Rolls², who thus prophesied with respect to the bill:—‘I entertain considerable doubt whether the cautious provisions provided by the Commons to prevent sales for less than their value are not only more than are necessary to effect their object, but so stringent as to impair the efficiency of the additional process which the amendments are intended to provide.’ The noble lord, you observe, speaks with the authority of a master. ‘Considering the caveats, the notices (sometimes difficult, if not impossible to serve), the valuations, the five years to elapse, before a perfect and unimpeachable title can be obtained, the liabilities for breaches of trust, and the powers given to redeem, it is manifest that the obstacles to sales under these provisions are very great. Perhaps they may, in their application, be found so great—in many cases where there is considerable complication—as to make the additional process impracticable, and to leave to him who desires to have the benefit of the act that

¹ July 31, 1848. Hansard, vol. 100. p. 1037.

² Hansard, ubi sup. p. 1039. In this speech Lord Langdale made the following statement as to England. “A noble lord has asked would any one propose such a measure as this for England. If it were demonstrated that such a Bill were expedient for England, I do not say that I would venture to propose a Bill in the exact terms of this Bill, but I think *I should venture to propose enactments still more directly and avowedly founded upon the principle of this Bill*, and taking all just care to secure sales at proper value, proceed to sell the estates, with less complicated and obstructive means of precaution than are here provided. My Lords, I fear that the precautionary provisions contained in the amendment are so stringent that they derogate unnecessarily from the intended efficacy of the mode of proceeding they authorise.”

particular mode of obtaining it which was at first provided by your lordships.'

"What is that benefit? Why, to go into the Court of Chancery. You substituted a principle which you thought was more simple, but which Lord Langdale thought would be so cumbrous as that it would not work, and would drive the unfortunate persons who desired to have the benefit of it to the mode originally contemplated — viz., a suit in Chancery. Well, it is not for me to speak lightly of that benefit. I would not say a word inconsistent with respect for the Court of Chancery; but when the Master of the Rolls says that he fears the new process will be ineffectual, and that parties must in the end resort to the benefit originally contemplated, I may be allowed at least to refer to the present Lord Chancellor, who presides over that court, for an account of the benefit which is here referred to. This, then, is the Lord Chancellor's account of it,¹—

"'He had been himself familiar with the practice of the Court of Chancery for many years past, and he well knew the great benefits which it conferred upon the public; but at the same time he would own that he would not willingly enter that court as a suitor, nor would he advise any of his friends to do so, if they could, with propriety, keep out of it.'

"The Lord Chancellor says, that while he is quite willing to enter the court as Lord Chancellor, he would be very unwilling to enter it as a suitor, or to recommend any of his friends to do so, though at the same time he is quite aware of the inestimable benefit which it confers upon the public. I was afraid that the honourable and learned gentleman (Mr. Napier), with his legal acuteness, was going to throw some difficulties in the way of my proposed facilities for the transference of land. But I was happy to find that he spoke like a statesman rather than a lawyer, and admitted that great benefit would accrue from increased facilities for the transference of property. But I know it might be easy for many lawyers to get up and demonstrate the impossibility, according to the established rules of proceeding, to afford any relief in such cases, and I could not stand before them for a single instant. But if you admit the principle that it would be for the benefit of all parties that there should be some simple process of facilitating the transference of estates, why are we to be deterred, by legal difficulties and all the chicaneries of a Court of Chancery, from effecting this

¹ Hansard, *ubi sup.* p. 1019.

great object, if it can be consistently done with the rules of equity? What did you do in the case of the Land Improvement Act, when you were not afraid of the Court of Chancery? That is one of the best and simplest acts I ever read. I am only astonished how it ever passed through the House of Commons,—I mean as regards the legal and equitable principles on which it is founded. By that act (the 10th and 11th of Victoria, c. 32.) the Treasury was enabled to advance money for the improvement of an estate and to affix a rent-charge upon the estate for the repayment of the same. If such rent-charge were in arrear for the space of two years, the Paymaster of Civil Services might apply for an order for the sale of all or a competent part of the lands so charged, and the Court of Chancery was authorized to direct the paymaster of Civil Services, without any further process, writ, or other proceeding, to raise by sale the amount of rent-charge due at the time of sale, and to pay the surplus to the owner, or to the Accountant General of the Court of Chancery, for the benefit of parties interested.¹ It was provided that the purchaser should not be bound to see to the application of the money; and that any conveyance executed by the Paymaster should be binding and conclusive, and convey all estate, right, and title whatsoever.² That is the way to solve the difficulty. Why can't you apply the same rule to the arrears of poor-rate? The noble lord opposite (Lord J. Russell) seems inclined to propose that the arrears of poor-rate on such estates should be remitted. I hope he will not remit them. I do not see, if there have been arrears for the poor-rate for a certain time upon the estate, why the estate should not bear those arrears; and, if not, why power should not be given to commissioners to sell such portion of the estate as would cover them, and at the same time to give the purchaser a simple title against all the world. By the present law the poor-rate is a prior lien on the land, and consequently you have a perfect right to realize the arrears of the rate from the encumbrancers on the estate. Then take the course which I earnestly recommend; invite new capitalists to undertake the cultivation of the land. Do not transfer the estates from one insolvent proprietor to another, for if you do you will do no good; but enable small proprietors to come and follow the example of the Lancashire young man I mentioned—to cultivate their own vegetables, to live upon the produce of their farms, and to write home to their friends that there is no country in the world which has better

¹ Sect. 49.

² Sect. 50. The terms of this section might perhaps be made stronger.

prospects. I cannot doubt that such a commission as I suggest would facilitate the amicable transfer of land—would bring parties together, and convince the present owners that there was no use in maintaining the present state of things. I believe that those who have land to dispose of would find not only individuals, but companies, in this metropolis disposed to follow the example of the great companies of London in the time of James I. I mean disposed less from hope of gain than of making a character, to invest their capital in the improvement of Ireland. These are my suggestions—viz., to seek the relief of the present distress by encouraging draining; by opening up roads through inaccessible districts; by erecting piers for the accommodation of the fisheries; by promoting, under sound regulations, emigration at the expense of the state, without interfering with voluntary emigration; above all, by facilitating the transfer of property from insolvent to solvent proprietors, and by abandoning the present injurious system of giving gratuitous relief, whether in exchange for labour or not, and reverting gradually to the wiser principle of the act of 1838, of applying the only effectual test—the workhouse test—as a proof of destitution. I can with truth say that I make these suggestions, particularly as regards the transfer of property, with the utmost hesitation—being an unprofessional man. I am deeply sensible of the necessity of a remedy, and I do not believe, if you are as convinced of the evil as I am, that you will be deterred from applying a remedy by any legal technical difficulties. I at once say that I would, rather than the present state of things should continue, see the jurisdiction of the Court of Chancery ousted altogether. You have done it in hundreds of cases before. I would not permit the title to be postponed for five years, but would have a tribunal of competent men of high legal authority to decide the case at once.”

We have thought it right to make these long extracts from Sir Robert Peel's speeches, because they appear to us of the greatest importance in the present juncture of affairs. We are not so vain as to suppose that our own suggestions, even to the limited extent which they went, have had anything to do with the proposal thus made; for it will be seen how much further the Right Honourable Baronet goes than we ventured to do, when he proposes that the amount of poor-rates shall be defined, and that Government shall become the purchasers and managers of land to a large extent. But it would be

affectation in us not to welcome speeches which bring home to the comprehension of all the principles which we have been long endeavouring, in our small way and limited circle, with feeble ability, to explain. Sir Robert Peel has been able to grasp the whole subject as a statesman, whilst we have simply been working at small details as lawyers: but in these details, we trust we may be of some service; and we venture to assert that, without infringing on the rights of property in any unusual manner, there will be no difficulty in carrying the plan proposed into execution; that no greater powers than those already given by act of parliament, and the rules of conveyancing practice, are necessary for its complete fulfilment, having a just regard to the rights of all persons concerned. All that is wanted, as it appears to us, is to follow the precedent of the Ulster plantations. So far as we can make out by the Irish Statute Book, this was nearly as follows: the first act of the reign of James I., which recognises the title of that monarch, recites that care had been taken for the civil plantation of great "scopes" of land escheated in Ulster by attainder of treason, but the necessary powers to deal with, sell, and manage the land seem to have been given to commissioners by virtue of their commission and the royal authority, and not by act of parliament; for we do not find any further reference in the statute book to this matter, until the tenth year of the reign of Charles I., in the year 1634, when an act (chap. 3. sess. 1.) was passed, called "An Act for confirming of letters patent hereafter to be passed upon his majesty's commission of grace, for the remedy of defective titles," which probably relates to the titles made under the commission; but a later act (chap. 3. sess. 3.) expressly refers to the recent plantations¹, and after

¹ The preamble of this act is certainly flattering enough. It relates "that sundry plantations have at severall times been made in the severall counties of Wexford, &c. grounded as well upon ancient as recent titles of the crown declared as well by inquisitions or other records and evidences, upon all which divers patents have been passed, and that very many undertakers, and others of British birth, and very many natives of best quality and condition, have been there planted and settled, and severall lands, tenements, and hereditaments granted and disposed to corporations, forts, incumbents of churches, schools, and other good uses, by occasion of all which very many castles, bawns, strong houses,

enacting that the king has in right of his crown a lawful and indefeasible title and estate in fee simple in the lands named in the letters patent, provides that all such lands shall be enjoyed by the new grantees as well against the king as all others, free from all former rents, arrearages, profits, or mean rates whatsoever.¹

These were very simple enactments, and were very effects, and towns walled have since been built and erected, and innumerable inclosures and improvements made, and also several tradesmen of British birth and manufactures have been thither brought and conducted by the undertakers, servitors, natives, and others, to their very great charge and expense, willingly performed to the terror and discomfort of all evil disposed persons, to the unexpected enriching and civilizing of the said several counties and territories, and to the great joy and contentment of his royal majesty and all good men, insomuch as by the great blessing of Almighty God, upon his majesty's most gracious and successful government those places and counties which heretofore have been only disturbers to all his majesty's loving subjects of Ireland, and burthen, loss, dishonour, and expense of the crown of England, have now been enabled to yield and afford to his most excellent majesty as ample and beneficial aid and supply to all levies as any other proportionable parts of the kingdom have done." Considering the solemnity of this document and that it is a bare recital of facts, it is entitled to great weight.

¹ As to the mode of acquiring the lands Carte is not very distinct, and probably not very accurate, but we think he confirms our view. The lands in Ulster were effectually vested in the crown by escheat, and were granted by the crown to the undertakers under certain restrictions, stated at p. 17., and subsequently plantations were made in Leinster, and here the question of title appears to have been more difficult. "The situation of these counties rendered them of great importance, they lying in the very heart of the kingdom, and being naturally very strong, they afforded a safe retreat and shelter to the inhabitants who were mere Irish, tenacious of the Breton law and their old barbarous customs, dwelling in little nasty cabins in the winter, and wandering with the cattle on the wild and desert mountains in the summer. * * * The king saw it necessary to reduce them into the same order and subjection as the rest of the kingdom; and, therefore, by a special commission in 1614, had empowered the Lord Deputy Chichester and others, to take a view of the counties and inquire into the titles which the crown had to them or any part of them. The estate, number, and condition of the inhabitants, the chiefties, claims, customs, and rents of the present lords, and the best way of reducing and settling them." "The king's view in all these plantations was the security and general good of the kingdom and the improvements of the land thereof. He proposed to settle the lands in such a manner as the Irish themselves should find no grievance, but a reasonable satisfaction in it, and, therefore, ordered a proper provision to be made in the distribution of lands for the widows and heirs of chiefs, for the lesser as well as greater claimants; and what any of these wanted in the extent of ground which they possessed at the longest for life was to be made up to them by the firmness of the title to what was regranted them and the descent of it to their heirs." (p. 24.)

tual, and we think we may gain a hint from them. We have had too much abortive legislation already. We trust we shall not have another long act of parliament with an interpretation clause which requires an interpreter. What is now wanted is *action*. Some parliamentary aid will of course be absolutely necessary; but we cannot help thinking that if large powers¹ are given to the commissioners to take the steps necessary in this matter, subject, perhaps, to a *parliamentary* confirmation, that this will be the surest and safest mode of dealing with the question. If the jurisdiction of the Court of Chancery is to be effectually ousted, no appeal should be given to it; and we would willingly see this jurisdiction taken away, not only so far as the land is concerned, but also as to the proceeds of the land, for in this is involved no small part of the benefit to be derived from the measure. We wish the land to be set free, but we wish also that the present proprietors of the land, and those who claim through them—the wives, the widows, the children, yes, and the mortgagees—may receive due protection, and that the uttermost farthing to which they are entitled should be reserved for them, and should no longer be divided among the officers and practitioners of the Irish Court of Chancery. The late Mr. Jacob used to call the sister Court of England “a machine for grinding all the property of England into three per cent. consols, and distributing it in costs,” and the evil demon of this court (perhaps in both countries) is looking with gloating expectation at this moment on the deserted acres of Ireland as its own. We cannot but hope, however, that it will be disappointed; nay, we register one other wish that the admitted inability of this Court to deal satisfactorily with this matter will lead to the inquiry how far in its present state it should be trusted with any other; and that its friends in both countries will be wise in time, and, to preserve it from destruction, will take means to prevent it being perverted, as it now is in nine cases out of ten, into an instrument of almost unmitigated injustice.

¹ These should enable the Commissioners to deal with the question of *tenant right*. See note (A), *post*.

ART. II.—THE LAW OF ENGLAND CONSIDERED AS
A SCIENCE.¹

To every thoughtful and inquiring member of our profession the question must occasionally present itself,—what is the precise elevation of those studies, and the true condition of those occupations, to which, as a servant of the law, he is called? Hurried along the swift and bustling stream of life, with sometimes scarcely even the opportunity to reflect, or the repose to deliberate, where for the moment we are, or what for the moment we are doing,—the inquiry may be unheeded, or entertained perhaps only to be suppressed, What is the true nature—what the actual merit, intellectual, moral, or social,—of that pursuit to which we are giving the best and most vigorous moments of our existence? Gentlemen, I propose to you this evening that, for a brief space, we moderate our onward course; that, leaning on our oars to rest awhile, we take a survey, even if it be but a passing and a hasty one, of the main features in the landscape of our profession, which lies outstretched on either side, before, and behind us.

The form in which I propose to place before you the suggested inquiry is, whether, and to what extent, the Law of England may be considered a Science.

Science, generally, has been said to be that department of human knowledge which depends upon the reasoning faculty. This may not furnish an adequate or sufficiently precise description of what is a *science*, or of what may be classed among the *sciences*; but I submit that what engages, systematically or necessarily, the faculty whose office it is to compare, combine, distinguish, and divide, constitutes *science*.

¹ This article is the substance of a lecture delivered by W. D. Lewis, Esq., at the commencement of last Michaelmas term, in Gray's Inn Hall. It is given to the public in this mode at the request of the conductors of this work. — ED.

Now, in proceeding to consider whether our system of law is a *science*, and to that end, what is a *science*, we may first inquire, in what respects, or in what sense, the law is *not* a science. And with this view let us glance at the systems or philosophies which have an undisputed title to the name of science.

Of the branches of knowledge comprehended in the idea of a science, the first to be mentioned is that which exercises the reasoning faculty with the exactness of demonstration. *Mathematical* or *geometrical* investigation, in its pure unmixed form, is certain and final. The truths which it establishes are based partly upon axioms and partly upon hypotheses, to the deductions from which the mind inevitably assents, and of which there can be neither reversal nor variation. Reason holds here undisputed sway. She establishes the premiss as an axiom, and she works out the conclusion. The process is pure, perfect, unmixed science. True, some parts of the definitions of geometry (as Mr. Mill has pointed out) are fictitious and assumed, if considered with reference to outward experience and real objects, but, attending only to the geometrical properties of the object, the reasonings of the science are necessary truth.

Other branches of knowledge concern the laws of the material universe,—the organisation and properties of matter,—the physical relations of things. In reference to all and each of these, there are certain ultimate phenomena, known by unerring observation, by which we reason from individual facts into generalisations and theories. “The purpose of these, throughout all their provinces, is to answer the question, *what is?*” (*Mackintosh*); and “their sureness and stability” are guaranteed by what Chalmers well terms “the constancy of nature.” The final causes are absolute and unchangeable, with which astronomy, geology, meteorology, chemistry, and the like, are concerned; the generalisations which result from an investigation of the facts of the system, are certain, and the conclusions of the reasoning faculty are sure. These we call *natural* and *physical sciences*; and they are also to a considerable extent mathematical or exact sciences; because, though not purely demonstrative, they are

mixedly so, and the causes of their phenomena may, in most cases, be completely assigned.

Next in intellectual dignity is *Theological Science*. In this there are certain final absolute facts, from which reasoning evolves the doctrines of religion. Whether we speak of *natural* or of *revealed* theology, this is alike true; though the phenomena in the respective systems are partially different. This science "instructs mankind in the moral system of the world: that it is the work of an infinitely perfect Being, and under His government; that virtue is His law, and that He will finally judge mankind in righteousness, and render to all according to their works in a future state." It tells us, too, that Christianity is "a revelation of a particular dispensation of Providence for the recovery and salvation of mankind." (*Butler*.) What does reason accomplish here? Reason first establishes the facts, and reason next educes and works out the theories which flow from them. We do not say, or, at least, do not feel *obliged* to say (for *some* undoubtedly think so), that the reasoning may here be carried to the extent of *demonstration*; but the point concerning this science material in our present inquiry is, that the doctrines and precepts of religion are, in essence, certain and unvarying. Conclusions from immutable phenomena, they are themselves immutable.

Much resembling Theology is that of which I next speak, *Ethical Science*; and here, clearly, we part company with mathematics. We do not say of moral philosophy that its conclusions admit of demonstration. It is concerned about the rightness and wrongness of actions and of feelings, about duties, about rights and obligations, and so forth. It comprehends the vast domains of jurisprudence and political philosophy. The precepts which it delivers on these subjects are solely the results of reasoning built upon the phenomena of our moral being. Those phenomena are ultimate laws in our existence — they are its conditions, internal and external; and therefore the conclusions of morality are *fixed*. They do not waver, and are not liable to change. Some, indeed, of those conclusions are, *in their own nature, indeterminate*, with reference to the manner and conditions of their operation;

that is, the obligation of the principle is imperfect in respect of the indeterminateness of the principle itself. But the science is still an enduring, unchanging science, in the doctrines which it holds forth, and the theories which it propounds. It has been well said, that "wherever we look in this world of thought and action with which man is most concerned, we find all things bound together by a network of moral connections;" that in this system there are "axioms or postulates on which the whole fabric of the reasoning rests;" or, rather, "principles which, on a calm and thoughtful consideration, are seen by all men to be true." (*Whewell*.) Or the matter may be differently represented by saying, with the same writer, that the "fundamental elements of morality are *facts* of which we are conscious;" these *facts* being, indifferently, both general *truths*, and the external impressions derived by the exercise of consciousness and the senses.

And so of *Psychology*, or *Metaphysics*, or, in other words, *intellectual* and *mental* science. This is that theory of the understanding in which may be said to be lodged the first principles of every science; in which "every branch of knowledge has its root:" and this is that mental philosophy or analysis by which we "trace, in their various forms, the phenomena of mind," (*Brown*); and "on which arise the august and sacred landmarks that stand conspicuous along the frontier between Right and Wrong." (*Mackintosh*.) Its ultimate law is consciousness, and the media of that consciousness are reflection and perception; and the whole process by which the laws of our mental constitution and operation are evolved, is *reasoning* from the indubitable and unchanging phenomena presented in its final law. In its *constitution* it is science, and in its nature and *essence* it is *fixed* science.

And, once more, the science of *Economics*, or *Political Economy*, is a philosophy, though wrapped in an unfortunate etymology, whose theories are based upon certain invariable relations of political societies or states. It promulgates doctrines founded upon facts. Those facts are what necessarily arise out of the state of existence called society, as opposed to the state of nature. And hence it advances conclusions, many

of which are of perpetual obligation, not liable to any fluctuation, even as society itself is become a necessary, and not a fluctuating institution of humanity. Some of the doctrines of this philosophy are, like some of the precepts of morality, contingent and imperfect in their own nature and operation, and, consequently, also in their obligation; but not any the less on this account are the theories of *Political Economy* final and unvarying theories. They are "the true principles of national subsistence and wealth, which everywhere govern that important part of the movements of the social machine." (*Mackintosh.*)

Now, having taken this glance at one or two of the characteristics of the mathematical, the theological, the ethical, and the economical sciences, we shall easily see in what sense, or in what respect, a system of *positive law* like ours is *not* a science. I am, of course, speaking of *English* jurisprudence, and not of jurisprudence in the abstract; for that is comprehended in moral philosophy. We will assume, for the moment, that some portion of a system, or of the foundations of a system, of positive law, may, by possibility, possess or be attended with the attribute, the element, of fixity in its first principles. Can it, with the benefit of even this assumption, be designated a science, in the same sense in which we speak of the other philosophies as sciences? Certainly, the time has been when some such view has been propounded. For it has been said, that "all laws that are just and prudent ought to be viewed as *radii* and *effluxes* from the Eternal Wisdom, having their exemplar cause and bright idea in God himself. The immediate author of these is *human reason* exalted and purified by learning and experience, and enlightened by the Divine Spirit. Attempts may be made, without danger, to discover how the vast multitude of cases that follies, or passions, or necessities of men have obliged us to be acquainted with, are all accountable and reducible to some few theses, which, being prime emanations and grand maxims of reason, govern and resolve the subordinate miscellany of queries, and may serve for a clue and conduct through the labyrinth of that perplexed variety." (*Wingate.*)

Is there, I ask, a body of fundamental architectonical prin-

ciples of universal application which we can fairly assert to regulate and pervade our system of law as a whole? Do we derive the rules of English Law as conclusions from some known principles, or determinate theories in philosophy, by the process of ratiocination and mental evolution? Do morals, religion, and economics supply us with the *arcana* of our system? the foundations of our whole theory?

Now, it will be observed, that *if* our law is based upon a set of final dogmas ruling and pervading it as a whole, they *must* be principles gathered from some one or more of *these* three sciences. They must be either ethical, theological, or economical. For, what is Law? Law is essentially an *objective* theory; not objective *only*, but objective certainly. Beyond the province of *moral* science in determining questions of political, social, and private *duty*, and *religious* science in guarding and providing for those reverential observances which flow from the relation of a people to their Maker, and *economical* science, in adjusting the *material* interests of a nation, — I say, *beyond* the limits of these domains, there is nothing in which law can engage itself. It must be either impotent or aimless, if the provisions of the law do not terminate in results akin to these. Can we conceive a system of law wholly *subjective*? A law founded, *e.g.*, upon the theories of logic or of grammar? Again, can we conceive a theory of law so utterly mistaken as to be derived from principles in *physical* or *natural* science? in astronomy, meteorology, botany, or chemistry? And, once more, can we apprehend such a thing as a body of law based upon *metaphysical* doctrines, whether axioms or speculations merely? — a system issuing forth from the abstract subtleties of mental science? We *cannot* realise all or any of this.

Then, we return to the inquiry, — are there any ultimate phenomena in our body of law derived from the philosophies of morals, religion, and political economy, or any of them? I think it clear that there are not. I might establish this by entering into an inquiry to show that there are many rules in our law that not only do not flow from, but are opposed to anything which would be admitted by the principles of the sciences to which I have referred. For example, under what

head of *ethics* should we bring such a rule as this: a man expresses unambiguously his meaning to give the entire property in a certain thing to another; but there is some defect (arising from the technical policy of former times) in the form of his declaring that meaning, or, rather, I would say, in the form of the language by which he indicates the intention; and, because of that defect — that informality — the intended donee does not take the thing, or he does not take the whole property in it. And if it be not referrible to any *moral* standard, is it supported by any economical principle? None, certainly, that I am aware of. Again, take the case of a man being indebted justly to two persons; to the one by a writing sealed, and to the other by a writing not sealed; and, upon the death of the debtor, because there is not enough to pay both, the creditor with the writing unsealed may, in certain cases, receive nothing. To what principles, either of morals, religion, or economics, is this to be referred? A tenant for life suffers houses to fall and buildings to decay for want of due reparation, and afterwards dies; the person who succeeds as remainder-man is not permitted (with a very limited exception) to make the estate of his predecessor liable for the loss which he has brought upon the other. Under what dogma would this be comprehended? The power of one man, again, who is in possession of a limited interest, wrongfully to put an end to the future interest of another, in the same thing, by a destructive assurance — under what head would this fall?

But a better mode of answering our question is to come at once to *the fact*. If there be any final principles of abstract philosophy upon which the provisions of our law rest, what are they? Now, there is no question but that, in a certain general way, many important leading doctrines of morality and economics have often been adduced in support of conclusions of law. Thus we are told, 1. no one can transfer more to another than he has himself; 2. a power derived cannot be greater than the primitive or original power from which it is derived; 3. contracts must be determined or dissolved in the same manner that they were made; 4. he who claims paramount a thing shall neither take benefit

nor hurt by it; 5. construction is to be made according to the subject matter; 6. he who cannot perform the effect or consequence of a thing shall not have the thing itself; 7. the attempt is not material unless the effect follows; 8. the law does not make useless commands; 9. what is tacitly understood is not to be considered wanting; 10. personal claims die with the person; 11. things inure diversely according to the diversity of the time; 12. what is prior in time is stronger in right; 13. in what a man is delinquent in that he is to be punished; 14. strangers that are neither parties nor privies are to be favored; 15. a thing transacted between some individuals ought not to hurt, though it may sometimes profit, others; 16. no one is punished for another's fault; 17. the law favoureth things done in another's right; 18. nothing is to be void which by possibility may be made good; 19. a false description does not render the gift inoperative; 20. that is certain which may be rendered so; 21. the law regards more the acts of God and of the law than those of the party; 22. when several remedies are given, the party who has them may elect which he will use; 23. consent takes away error; 24. no injury is done to a party who consents; 25. concerning the dead nothing but what is good is to be presumed; 26. it is the interest of the state that the Courts should be ready and skilful in the administration of justice; 27. private agreements shall not contravene the public or general law; 28. none shall take advantage of his own wrong; 29. the law does not require a man to do that which is impossible; 30. prescription does not run against a party who is unable to act; 31. fraud cannot be conjoined with right; 32. when anything is prohibited, it is prohibited indirectly as well as directly; 33. deceit may be known as indulging in general terms, and avoiding particulars; 34. the law does not require a man to show that which makes against him; 35. none shall take exception to an act which has operated to his own advantage; 36. the laws assist the watchful and not the negligent; 37. it is idle to do a thing in a circuitous way when it may be accomplished more directly; 38. no difference or change shall be made pending a suit; 39. a general rule is to be restrained when it operates mischievously; 40. no one is to be punished

twice for the same fault; 41. the laws are adapted to things as they more commonly happen; 42. every act is lawful when it stands indifferent, whether it be lawful or not; 43. under pretext of what is lawful, an illegality ought not to be admitted; 44. the law favours commerce; 45. common error makes law; 46. the law will not presume the commission of a crime; 47. distant transactions may be presumed to have been rightly and orderly performed.

Now, doubtless, this is an imposing array of general principles, the counterparts of many of which we may trace in the regions of morals and economics. But in what sense do they enter into the theory of English Law? Are they doctrines which, of their own proper force, decide every case that falls within them? Are they of direct imperative application? If this be *not* their character, it avails nothing to the present point to know that these are principles (forming part of universal morality, or religion, or political economy) which frequently receive *application in our law*. The principle may be introduced as a prop to support particular conclusions in the English Law; nay, it may, even frequently, have been used as the main or the only reason for the conclusion adopted. But what is needed, in order to satisfy the present inquiry, is to show that, by force of these doctrines or principles alone, the law decides in cases which fall within the terms of them,—that the principle would have just the same weight in determining a doubt in the English Law as would belong to it in the investigation of a point in abstract philosophy. The propositions are nothing, except as effectual operative bases upon which the system of law acts; and, if cases can occur in which the principle, standing alone, would fail to decide the point at issue, — still more if there should be cases in which it would be utterly improper to import the general principle into the investigation,—then it must be clear that, as final absolute causes of legal doctrine, these theories are wanting, and must be discarded. Now, is not such the actual state of the case? It is perfectly notorious to all of us that the practical efficacy of these principles is directed, controlled, and interfered with by the concurrence of various technical and artificial rules, extrinsic to the doctrine,

and yet of imperative application. And again, it is well known that the shape or tendency of the doctrine does not, at this day, depend upon its own terms and spirit alone, but likewise upon the course of previous interpretations and decisions (whether agreeable to the spirit of the doctrine or not), and their general effect; so that a case which would be within the operation of the doctrine, were there nothing to intercept its application, is excluded from it, just because there is such an impediment. If we take (by way of illustration) one or two of the maxims which I have just now detailed, we shall at once acknowledge the truth of this remark:—"No man can transfer more to another than he has himself." This rule would be utterly incompatible with the doctrine that, by feoffment, fine, or recovery, a man should be able to acquire or pass an estate by wrong; and yet that doctrine has long been a very prominent and familiar point in the English Law. And so, again, the rule that "a false description does not render the gift inoperative," does not take effect, unless it be first found that the *falsa demonstratio* is superadded to something which, without it, would be technically certain. This limitation of the doctrine is, first, introduced by the decisions of our Courts; and then, engrafted upon this, there is a long series of binding authorities, which must be regarded in determining whether, in the particular case, there is the requisite *certainly*, with a false *description* merely; or whether, on the contrary, the whole is, in its essential parts, *uncertain*. So, lastly, the maxim that "prescription does not run against a party who is unable to act," is subject to an exception so extensive that it nearly destroys altogether the integrity of the doctrine as a general rule; for if time have *once begun* to run against the claim, the fact that a party *under disability* succeeds to the claim,—or even that, for a considerable period, there is *no person at all* to succeed to and enforce it,—does not arrest the progress of the statutory limitation. Adverting to this, the rule itself is not only not invariably followed, but is, in such cases, directly contravened.

Then it seems that the relation of these general principles of science to the provisions of our own law is merely and

simply this: — A variety of separate individual cases exist, in which the general principle may be considered to be exhibited: the individuals are embraced by the terms of the generalisation; but it does not, therefore, follow that the generalisation itself belongs to our system of law. It is illogical to generalise, and then search for as many particulars as we can find to support the theory. It is almost an inevitable consequence of pursuing such a method, that the generalisation will not keep close to the individuals which support it, but, on the contrary, will prove far broader and wider. And so it has, in fact, happened in this instance. Accordingly, there are few, at the present day, to contend that the English Law sets out with any general theories of moral and economical science, as the fundamentals of its system, from which every thing else is to be deduced.

But, once more, is there not still another consideration which, independently of those I have been adverting to, settles conclusively that our system cannot be likened to the abstract sciences? Every doctrine or proposition in those sciences is a principle *formed* by reasoning and *proveable* by reasoning. But there is, almost necessarily, in a system of local jurisprudence, much of *positive* and *arbitrary* matter, for which no place is found in the generalisations of its doctrine. There are various rules for individual cases, which do not range into classes, and cannot be made to subserve a principle, without danger to the integrity either of the principle or of the individual case. How should we range the rule, that the after-acquired property of a bankrupt is free from the debts proveable under the fiat, but that the after-acquired property of a discharged insolvent debtor remains subject to execution in respect of the debts owing at the time of his insolvency? or, how the rule, that, in regard to *one* class of insolvencies, the future estate of the insolvent *vests* in his *assignee*; but, in regard to others, is liable to *execution* upon a judgment *only*?

Sufficient, then, has been said to show that, in one very material particular, the abstract sciences differ from our system of law; and, indeed, it might with safety be added, from all local and provincial systems of law. But there is yet another consideration which still more forcibly leads to a

similar result, and which, in the preceding remarks, I have assumed in favor of the *opposite* theory. The law of England does not—and no system of positive law can—possess the *immutable* phenomena which distinguish theology, ethics, and economy. Granted (for the moment) that our law has adopted for itself all the determinate principles of these sciences,—or, at least, of morals and economics,—and granted that it has constructed all its minor rules as deductions and conclusions from those larger principles;—it would, nevertheless, still be a system as far removed as ever from the conditions of a *fixed* science. For it is of the *essence* of a system of positive law to be *changeable*; and it is but an accident of its character as such, when it recognises permanently, as its ultimate principles, the conclusions of universal philosophy. Relatively to the body of law in which they are incorporated, such conclusions are not *necessary* or *fixed*, but merely *positive* truths. “Constancy of causation,” says Mr. Mill, “is the foundation of every scientific theory.” And again: “Any facts are fitted, in themselves, to be a subject of science, which follow one another according to constant laws.”

Then, we now proceed a step further in the inquiry, and ask whether the law be a science in *any* respect, *objectively*. It is not an *exact*, it is not a *fixed* science; is it one in *any* respect relatively to its *purposes*, or to *external life*? Now I have already observed that there are but three ranges in respect of which it is possible the law can be an *objective* science,—theology, ethics, and economics. All the purposes of a positive system of law—all the external matters to which it relates and with which it deals—are embraced by one or another of those sciences. Is it, then, in any sense, a moral, a religious, or a material science? It may answer this description in one of two senses, or it may answer it in none. It may be either the science of religion, of ethics, and of economy, enacted into law as a *whole*; or it may be the application of a *selection* of the more prominent or practical principles and doctrines of those philosophies. Now, there are insuperable impediments to the conclusion that English Law—or, indeed, any other system of positive law—can, in any case,

be *itself* deemed the general science or philosophy whose principles it adopts. For, first, if that philosophy were placed, bodily and entire, in the system of local law, it would not, *therefore*, entitle that local law to the designation of the original science. The science is one and entire; and, if adopted in a positive system of law, the philosophy adopted is just as much the philosophy of the abstract science as it was before such adoption; and it is not *the law* which can be called the science of morals, &c. And, again, as a part of the local system, the philosophy would be *changeable*, and would inevitably *be changed*; and this is opposed to the essential attributes of those fixed sciences of which we are speaking. But, further, we may take it as an ascertained *fact*, that there is not such an optimism in our law, or any other positive system, as is implied in the conjecture that the entire principles of the three sciences in question, or of any one department of them, are embodied in the system. To take the narrowest range, will any positive jurisprudence be found to embody, in their pure and unadulterated form, all the leading rules of moral justice? And, lastly, there are certain principles in ethical science, which, if they were even *attempted* to be enforced by the sanctions of *law*, would at once, and by virtue of that very attempt, cease to have any consistent place in the science, because its enforcement as *law* would be uncongenial with the very constitution and conditions of the theory. Such are most of the duties of imperfect obligation which occupy so conspicuous a place in the speculations of moral philosophy. And the like may be remarked of some points in the theory of *political economy*, though not, perhaps, to the same extent.

Now, I have dwelt thus at length upon the question whether Law is a necessary branch or representative of any abstract science, from the consideration that, upon this very point, claims have been advanced, even by moralists, on behalf of positive law, which appear, to my humble apprehension, unsound and dangerous. They do not, indeed, make their moral system, or their deductions from it, depend upon the sanctions of Law; but they sometimes treat Law as the true and viable representative of their morality. They define the

points of moral doctrine by the kindred conceptions which they find in the repositories of provincial jurisprudence : or, if they do not attempt this, yet they profess to assign to Law the functions and the sanctity of their moral system, in a manner implying that the rules of Law are necessarily accurate exponents of the immutable decrees of morality. They concede to the doctrines of Law a share in the same sanctions which establish the rules of their own ethics. Thus, Dr. Whewell has said, " Law is a portion of morality : " " Law is a portion of the letter ; morality is the whole of the spirit : " and, in other places, he has spoken of " Law, the more defined form of justice ; " of the laws of prosperous states, which we are to " accept and adopt as fundamental principles of universal morality : " and, in consistency with these expressions, the whole structure of his system of morality is conceived upon the principle of assigning to the positive law of states a special and separate function, as constituting the basis — being the " skeleton," the " guide-post " — of morality. But the incongruity of such an arrangement is evidently felt by the professor himself ; for, in the first place, he is obliged to draw a distinction between the conceptions and the definitions of moral rights ; and then he admits that, in respect of these conceptions being differently defined in different communities, " the rules of morality may differ." And then the language which he uses to express the office of Law, is, " That which is legally fixed is also *intended* to be morally right : *Jus* has for *its object* to conform to the idea of justice : " " Law must always *attempt* to conform to morality." Again : " Men change their rules with the view of making them *more nearly conformable* to the supreme rule of human action : they *endeavour* to determine rights more rightly ; to make laws more just." And again : " The law may be altered by the progress of time, and by the *improved morality* of the legislative body." Now I conceive, with the greatest respect for so superior an intellect, that if it be necessary thus to qualify the terms in which the moral relations of positive law are depicted, there must be error in attributing to local jurisprudence any place in the scientific deductions of a moral system. The professor has himself found it necessary to encumber the

theory with limitations which appear to deprive it altogether of significance. He is compelled to answer the objection that his system adopts so much of actual law, that it must in some measure be affected by the variableness and vagueness of that material, and must fall far below its own pretensions to exact reasoning. For this purpose, we are told that laws are taken not as authorities, but "as examples of moral doctrines." But, still more remarkably, there is the concession that we are not to accept, as guides in our morality, the laws and customs of uncultured nations: "We are not to frame our moral scheme so as to include such decrees." But what remains of the theory after qualifications such as these? And see what a powerful objection is furnished by the facts of our own legal history; which, be it observed, is one of the two selected by Dr. Whewell as exponents of moral science. Are there not several branches of our jurisprudence, directly relating to subjects of moral doctrine, in which the rules of English Law have, in the course of time, undergone not change only, but absolute reversal? Wagers were, until recently, perfectly legal, with a few limited exceptions: they are now prohibited. Gaming was prohibited in the reign of Charles II., and it continued so (with some exceptions, chiefly in favor of horse-races) until the present reign, in which the prohibition has been removed. Usury was in all cases illegal under a statute of Anne: the present reign has abolished this restriction as to all contracts not comprising real estate. A beneficed clergyman's trading contract was illegal and void until the passing of a late statute, which, while it prohibits the trading, makes the contract enforceable. The charging of a clergyman's benefice was illegal under a statute of Elizabeth: for nearly twenty years that statute was repealed, and the benefice accordingly might be charged; but the prohibition was afterwards renewed, and it still continues. Now, I venture to ask, is the law of England the exponent of the theories of morality upon these important moral questions? Can any moral system be said to include its decrees on these subjects? If so, how is the conclusion reconciled with the immutability of ethical truth?

But, although we cannot claim for Law a right to arrogate

to itself the title or the consideration which belongs to the ethical or the other sciences, we must yet give its due weight to the fact, that the very same phenomena about which those philosophies are conversant, are the materials which give being and operation to Law. Law is the rule of civil government; and civil government is concerned with the moral, the religious, and the material interests of the people governed. Hence, it necessarily follows, that propositions of *some* sort will emanate from this law, concerning the subjects of those philosophies of which we are speaking. And the question is, whether *our own* law deserves, *relatively* to these topics, the designation of a *science*. Is it, in short, an *objective* science?

Now it must be perfectly plain, that if, in its *internal* structure, our law do not exhibit the essential conditions or features of a science, it cannot be deemed one for *any* purpose. I shall presently state more explicitly how, as I think, the scientific character of the system is determined. And we shall, I trust, agree that it is determined affirmatively when we find that, in the main, the system is not made up of a number of arbitrary propositions designed for particular cases, but by reasoning and analogy from general principles comprehending *many* individual cases. Unless the Law be a science in this respect, it cannot be so in any other. But the converse of the proposition is not true; for it may, to a considerable extent, reach the dignity of a science in its structure, and yet fail to exhibit itself in that character *in its external relations*. In order that it be a science *objectively*, it must, in those provisions which it promulgates in respect to the moral and other interests of the people, exhibit the same qualities which make it a science *subjectively*. The Law may contain within its inner circle, most excellent logic and large and well ordered rules for the guidance of judicial discretion and the like, and yet the doctrines or propositions which it puts forth touching the concerns of society, may be so narrow and special—so minutely individualised,—so unreasoning and arbitrary,—that, in its external aspect, it will not deserve to be characterised as a science. Or, again, the Law may condescend, to *some* extent, to generalise its theories, and yet the generalisations may be so *few* and *irregular* that

the account to be taken of them in the estimate of the whole, may be inadequate to impart to it the general character of a science.

For the present, then, we will assume that the English Law contains within itself a scientific constitution; and upon that assumption proceed to inquire how far it is exhibited outwardly in relation to morals, religion, and economics. Now, it is the especial function of a system of positive law to frame particular definitions, to be applied to the purposes of civil life, of the abstract conceptions of moral and economical science. Law is to reduce to specific application the theories of those philosophies which are or ought to be the standard for its decrees. There is an antecedent presumption, therefore, that the law of a state so well ordered as our own, will be found to contain a considerable number of rules embodying the pure and wholesome principles of universal philosophy. Let us proceed to inquire how far this presumption is verified. Now, we have already seen that the English Law recognises, to a great extent, the influence of salutary general principles imported from abstract science. We have concluded that, in one respect, those principles do not give to the law any other character than that which would attach to it without them; that, viz. of a *positive*, as distinguished from a *fixed* science. But the fact of such a body of principles existing in our system, is not unimportant to the question which we are now entertaining. True, they are exposed to the remark (which I have already made), of not being invariably *accurate* generalisations of the particulars which they comprehend. But they are abundantly sufficient (after making every deduction) to show that many important conclusions of general philosophy, in both ethics and economics, form principles and precepts of our law.

There is, however, yet stronger evidence forthcoming to the same effect. Let me first advert to some leading doctrines of our law bearing upon moral questions. And I would here repeat an observation already made, that in alluding to the science of morals, I speak of it in its twofold division, as the philosophy of private and of political duty (the latter branch being more popularly termed "politics").

Among the principles of our law addressed to points in

morality, besides those before detailed, you will doubtless recognise the following:— Provision for future illicit cohabitation is void. Provision for future or causeless separation of man and wife, is void. Bequests to children take effect in favour of legitimate issue only. A composition of a public offence by a private bargain, is void. A contract made with a person under duress or threats, or of insufficient discretion, is not to be enforced. The sale of public offices, or private bargains incumbering official income, are void. Contracts for effecting, directly or indirectly, any end prohibited by law, are void. An appointment to a public office of a person disqualified by interest, is void. A contract involving or leading to the commission of crime, is void. A contract creating a direct interest inconsistent with the subject's duties of allegiance, is void. A contract necessarily leading to indecency of evidence, is void. A contract wantonly affecting the peace or domestic feelings of individuals and families, is void. A contract speculating upon the result of pending legal proceedings, made between parties who may be connected with those proceedings, is void. A contract by a public servant, giving him a direct interest in the misperformance of his duties, is void. A contract made by a legal officer in consideration of his releasing a person from an illegal or unauthorised arrest, is void. A contract to indemnify against the consequences of doing an illegal act, is void. A contract between two in fraud of either, or in fraud of a third, is void. Voluntary settlements in fraud of creditors, are void. Wagers are in general illegal. The electors are not to be overawed by the presence of the military during an election. Persons charged with offences are presumed to be innocent until found guilty. And, finally, regard is had to the dictates of natural justice before recognising the legal proceedings of other countries, and in the determination of every case not specifically provided for by the laws of our own.

Besides these doctrines, I might enter upon a delineation of the principles of our grand and comprehensive system of *equity*, nearly the whole of which has a direct bearing upon the principles of ethics. Its doctrines of trusts, of specific

performance, of notice, of injunctions, of acquiescence, of laches, of election, of satisfaction, of hard bargains, of undue influence, and so forth, connect a great portion of our jurisprudence with the enduring principles of moral science.

Again, we have *economical* rules, from which the following are only a small selection:—Contracts and provisions in undue restraint of trade, are void; contracts establishing or extending monopolies not expressly authorised, are void; contracts and provisions in undue restraint of marriage, are void; bargains for loans at an excessive rate of interest are usurious and void; insurances without interest in the assured, are void; purchases of rights of action, to be realised only by litigation, are void; the unauthorised pretension to corporate functions and powers is a nuisance and illegal; a contract involving the discovery of public affairs by officers of the crown, is void; the raising money by the sale of life annuities is declared pernicious, and checked; the free alienation of property is secured by four branches of our law of vast consequence and magnitude, namely, the rule against perpetuities, the barring of entails by recovery, &c., the laws against mortmain, and the statutes of limitation of actions.

And what shall I say of the provisions of our law in respect to *religion*?

They are such as these:—Blasphemy is punishable; a law contrary to the Divine law cannot be enforced; Christianity is part of the law; the institutions of religion must not be vilified or profaned; property in irreligious publications is not recognised; charges upon an incumbent's benefice are illegal; the Sabbath is a sacred non-juridical season; contracts upon the Sabbath in the way of ordinary trade are void; general bonds of resignation and other simoniacal engagements are void; superstitious uses are void; the clerical function is entitled to various privileges and exemptions, and subject to many disabilities in respect of its alliance to religion; provision is made and legally enforceable for the maintenance of religious worship; dispositions for purposes or under circumstances involving a violation of religion, are void.

Now, after the foregoing enumeration, the proposition is,

I conceive, established, that there is an intimate alliance between the doctrines of our law and the deductions of universal philosophy. And I conceive, further, that the doctrines in respect of which this alliance exists, are precisely of that *character* which is required to show that, so far as that connection extends, our system is a *science*; and I conceive also that the principles in question are neither so *few* nor so *irregular* as to prejudice this conclusion.

Assuming, then, (as I have already said) that the result of the inquiry *yet to be made* will prove our system to be scientific (on the whole) *internally* and *subjectively*, the opinion which I should form of the Law of England, in its *objective* relations, is, that it would well deserve to be characterised a science of positive ethics and positive political economy; or, using other words, we may represent the Law of England to be (upon the assumption already made) a positive science *ancillary* to the abstract sciences of moral and economical philosophy. For, indeed, this is the true end of Law. Law waits upon these philosophies as their handmaid. Without the assistance which she offers, their theories are comparatively lifeless and unserviceable. It is their very nature and end to provide supplies beforehand for the appliances of Law; and that end is not met — but rather that nature is falsified — when the sanctions of Law are not given to the conclusions of their philosophy. And so, on the other hand, the true *dignity* of Law consists in its enforcement of the deductions of moral and material science. What by them is declared to be right, and obligatory, and necessary, and useful, and expedient, it is for Law to acknowledge as such in its authoritative decrees. It is for Law to make them speak and act in and through her. This is the just and true alliance — honourable to the one, and necessary to the others. And I say that the Law of England recognises this connection, and acts it out; and it does so in the only true and rational manner, by taking up comprehensive and practical doctrines, and forming them into the elements of her system, from which the *greater part* of what remains is to be deduced by reasoning and analogy. And may I not hereupon ask, whether *to us*, who are the administrators and servants of Law, this is not a grateful and

honourable circumstance? *Without* the life of Law, some of the highest, and noblest, and grandest contemplations of moral philosophy and economical science waste away and lie dead; *with* the energy of Law, they make a people good, and free, and happy, and prosperous. And we are the guardians and ministers of a law which does give all its energy to the dissemination of fundamental morality and wholesome economy.

We now proceed to inquire how far the Law of England is a science in the internal relations of its theories and principles;—how far it is a science *subjectively*. Every system of positive law must and will be characterised by one or the other of two conditions: Either it will contain a variety of positive and particular rules for cases *sui generis* and irregular; or it will supply a number of doctrines and principles, to which doctrines and principles it will delegate the decision of the various individual cases which fall within the terms of them. Shortly, it will be either *doctrinal* or *arbitrary*. I am not saying that, in either case, it will be *wholly* the one, exclusively *altogether* of the other. Indeed, we cannot easily suppose a law without any one general theory; nor, without difficulty, can we conceive of a law so entirely theoretic as to provide for no special or individual case. Clearly, there will be specimens of *each* in *every* system. But the general character of the law will depend upon what is the *preponderating* class of provisions or rules. What is it as a *whole*? is the inquiry which must be made. If we are compelled to answer that it does not systematically classify and generalise; that it does not, for the most part, rise above propositions, in which speciality, and particularity of circumstance, is found; that it, not uncommonly, either leaves a matter altogether unprovided for; or, if provided for, then *eo nomine* and exceptively;—if, I say, this be a conspicuous feature in the law, then, obviously, it is a very different system (if system, indeed, it be) from another, which is constructed upon the principle of viewing cases according to their order, equality, and resemblances—in parallels and homogeneous classes.

Now, of these two methods of law-making, one is obviously scientific, and the other not so. The one makes its operation

and its rules dependent mainly upon the exercise of the reasoning faculty, by comprehending in general doctrines a multitude of particulars; the other condescends commonly to individual cases, which are not of a rank to govern a class of particulars. The constituents of the system, in the one case, are principles and theories; in the other, they are the individual cases which in classes a principle or theory comprehends. "Philosophy," says Dr. Chalmers, "consists altogether in the classification of individual facts, and every such classification is founded on some common resemblance among the individuals. When they are without any resemblance, the mind cannot in any way regard them philosophically, because they cannot be associated together into one object of contemplation."

Then, which of these descriptions of Law does our English system exhibit? I unhesitatingly answer, the former.

The scientific character of our system of Law is, I conceive, very clearly shown in the circumstance, that so very large a portion of it—the Common Law—is made up of principles founded in immemorial reception and adoption by the people. These principles are *customs*, as distinguished from dogmatic precepts or edicts in the abstract. In the first place, there is a *consistency of theory* implied in the fact, that the law has evolved principles from the customs of a succession of ages, and transmitted them, in their original form of *principles*, to our own time. It is impossible to conceive a system fed mainly by supplies of this sort, not being *self-consistent*; because they are all the spontaneous growth of the system itself, and not imposed by a power from without. It would be to do, and yet not to do; to say, and yet not to say; for a body of law, constructed in this manner, to enunciate, co-ordinately, principles opposed or irreconcilable. And, again, it is clear that that science is the soundest which keeps closest to particulars: a principle which comprehends a number of particulars should be just such a theory, and no other, as the particulars themselves suggest and require. The generalisation should not be broader than the aggregate or outline of the items which are combined in it. Now, the whole of our Common Law has originated in, and been

fashioned by, the facts and relations of human life and human society. They have suggested the particulars for which the law has had to provide. Upon facts actually occurring, and not upon the conjectural conception of abstract cases, the terms and the conditions of each rule have been adjusted. That connection or combination of circumstances which has existed once will occur again, and in forms more or less resembling the first; so that provision for the earlier emergency is provision for other and later exigencies. The *doubts* which are apt to arise when we have a novel and untried enactment couched in general hypothetical language, do not find place when the actual business of life has occasioned the declaration of the rule; because there is at once seen an affinity between the terms of the doctrine and the case which has exemplified its operation. Each rule is thus at once furnished with an example and an illustration, which is handed down together with it; and, as other and additional operation is given to the doctrine, so these practical commentaries upon it multiply: they are at once the foundation of the rule, and its exponents.

Now I say, that, whatever the *appearance* of the thing may be, there is in reality more of true science in this arrangement than in the *codified* provisions of a law which is composed of nothing but *statutes*. The latter may have more pretension to a philosophic exterior, but it does not fulfil, so accurately as the other, the conditions and occasions of a science, which are nothing more than the sound and logical *compression* into classes (neither too contracted nor too large) of the separate phenomena with which it is concerned. And, if we advert to facts, does not our own legal history declare, in plain terms, that the single 4th or 17th section of the Statute of Frauds, or the Statute of Uses, or the Statute of Elizabeth in favor of creditors, or that in favor of purchasers, or the Statute of Mortmain, has (any one of them) occasioned more of doubt and litigation than the entire doctrine of executory devises and bequests (intricate and extensive though it be), which is not dependent for its effect on the terms of any legislative enactment? It is important to consider, further, that it has resulted from the historical cha-

racter and gradual formation of our system; that it is furnished with a variety of maxims and approved theories which stamp it with a certain solidity of character, and impart to it a fixity of structure, for which it is much to be admired. These maxims appear in our books with an array of differences reasoned out of them or resolved from them: they stand forth as prominent articles in the philosophy of our law, from which propositions have been eviscerated for direct application to the varying demands of society. They are the *leges legum* which are to correct and reclaim any erratic tendency in the *capita legum* of particular departments of the science. And these maxims or rules are not merely oracular or proverbial declarations, to have effect as such; but they severally enunciate *principles*, and embody the results of *reasoning*, which may be expounded and applied for ascertaining the proper limits of the *maxim*.

And, once more, we may remark that our law has been frequently transplanted. It has gone through several mutations, corresponding to those in our national history, which have rendered it richer, and more complete theoretically, than if it were a system once set only.

There is, then, a strong antecedent presumption that our law should, upon investigation, exhibit a system constructed upon the principles of scientific arrangement. In order to ascertain whether this be its true character, it may be sufficient to refer to some celebrated compositions on subjects of English jurisprudence, which its professors have given to the world. What evidence can be more satisfactory than the *Contingent Remainders* of Fearne, the *Compendium* of Burton, the *Evidence* of Starkie and Phillips, the *Mercantile Law* and the *Leading Cases* of Smith, the *Legacies* of Roper, the *Powers* of Sugden, the *Uses and Trusts* of Sanders, and the *Wills* of Jarman?

And, were there time for the investigation, I might select particular rules and doctrines in the Law, and proceed to show their comprehensive character, by detailing the variety of minor propositions which rank in subordination under them. I might show, for instance, that the single doctrine concerning contracts in undue restraint of trade, is distributable into

thirteen minor rules; the doctrine as to compounding public offences, into fifteen distinct propositions; that concerning the undue restraint of marriage, into twenty-one; that concerning separation of husband and wife, into nineteen; that concerning the sale of public offices, into thirteen; that concerning contracts in contemplation of illicit cohabitation, into fifteen; that concerning usury into twenty-two: and so forth.

Now, these doctrines are of a class especially important upon the present inquiry, because they are precisely those departments of our jurisprudence which connect themselves with the abstract ethical and economical sciences. And the conclusion we are enabled to adopt is, that the law not only recognises its obligation to enforce the deductions of general philosophy; but that the *machinery* by which it enforces them, consists of comprehensive *principles*, which it consolidates into a scientific structure.

Undoubtedly, the theories of our law are not always determinate theories: some of them must be distinguished as *indeterminate*. Of the former class are such doctrines as these:— That a limitation shall always (when possible) take effect as a contingent remainder rather than as an executory devise or shifting or future use.

That a contingent remainder shall vest at the earliest possible time.

That a remainder once vested shall never afterwards divest.

That an unwritten contract for land is not enforceable.

That an ambiguity in the terms of an instrument shall not be corrected, but that an ambiguity arising upon matter extrinsic may.

That a writing under seal cannot be altered by any act less solemn.

That a mortgage, so long as it continues a mortgage, is always redeemable.

That a contract to exchange land for money, or money for land, converts the subject constructively from the time of the contract.

That time never runs against a trust in favour of the trustee.

The *indeterminate* principles in our law, which must be distinguished and attended to in determining the measure of scientific exactness attained by our system, are such as the following: —

That a contract in *undue* restraint of trade is bad.

That purchases from expectant heirs must not be at a *gross* under value.

That after the lapse of a *sufficient* period, a person who has not been seen or heard of may be presumed to be dead.

That a voluntary settlement by a party *considerably* indebted at the time, is void as against his creditors, whether present or future.

That *material* alterations in a written instrument after its execution, vitiate it.

That a conveyance by a trader on the eve of bankruptcy, of the *bulk* of his property otherwise than by *bonâ fide* sale, is fraudulent against his assignees.

That a conveyance by a trader who becomes bankrupt, by way of *fraudulent* preference of any of his creditors, is void against his assignees.

That a fiat in bankruptcy founded on an act of bankruptcy, of which it is *inequitable* for the petitioning creditor to avail himself for that purpose, is not supportable.

Now, it must be admitted that, in respect to doctrines of the complexion of those last detailed, there is a discretionary indeterminateness, which precludes us from characterising the English Law a *pure* science, even in its internal structure and arrangement. For in all such cases there is something to be decided which cannot be determined merely by reference to the principle itself, but upon which, nevertheless, the conclusion mainly depends. The criteria in such instances are necessarily fluctuating and indefinite, since it remains for the judge, in the exercise of his discretion, to determine whether (to take the first case) the *extent* to which the covenant operates in restraint of trade, is such as to offend the doctrine that a covenant so operating is void; and this is a point which the principle does not and cannot (consistently with its own condition and character as a principle) be made

competent to determine. And the like may be seen in all the other instances mentioned.

What, then, is the conclusion of this second part of our inquiry? I conceive it to be this: that the Law of England, consisting, in so large a measure, of elementary and well-defined principles, by which it determines the great majority of individual cases (themselves resolved into theories and rules of subordinate grade), realises, in its internal working and in the arrangement of its parts, the conditions of a science; but that, inasmuch as there are principles belonging to it of indeterminate operation, and since (like all other national law) it has many arbitrary provisions for special cases, which cannot be classified as theories, it is a *mixed* science, as distinguished from one that is *pure*.

Consequent on the view we have been taking of the scientific character of our law, we have dangers to guard against, and duties to be mindful of. The tendency is sometimes seen in the professors of a science, to make the science conform to an outline and an argument of their own, rather than to follow, in their conceptions, the actual course of the science. There is a disposition to force every thing into the support and confirmation of the theory, though there be heterogeneous instances which, if duly examined, would prove its unsoundness. Like Wingate, who, wishing to reduce all the law to propositions of reason, set out with his maxims, and then marshalled, as seemed most fitting and convenient, the instances with which the law furnished him.

But I conceive the *opposite* of this danger is that to which we are most prone. We are eager to discover *differences* rather than resemblances between the cases and their principles. We readily embrace an exception if we can, forgetting that, by persisting in such a course, we may be the means of causing irreparable injury to the scientific character of the Law. We are multiplying (perhaps needlessly) the special individual rules of our system, and sacrificing the advantage of a well-ordered, clearly-defined, and yet comprehensive series of doctrines. This evil is augmented seriously when (as sometimes happens) the judge seeks occasion or opportunity to decide a case upon exceptive considerations, as if

fearful of holding up to the light of examination the theory which would have embraced it. It is the lamentable effect of this method of viewing legal questions, that, as fast as it solves one question, it breeds others. I would place before all who do not sufficiently bear this in mind, the illustration of Bacon, — “ Were it not better for a man in a fair room, to set up one great light, or branching candlestick of lights, than to go about with a small watch-candle into every corner ? ” There is no lack of bright examples to show us the true way ; for is not the pleasure derived from a perusal of the judgments of Sir W. Grant, Lord Stowell, Sir Thos. Plumer, or Sir N. Tindal, to be ascribed to their eminently scientific character ?

It must, I conceive, be the object of all of us who are engaged in the study of the laws of our country, that not only the knowledge of those laws should be of advantage to ourselves, but that the laws should, in their character of a science, receive some benefit from our participation in the administration of them. It must, assuredly, be our aim to strengthen and improve (where improvement is open) the foundations of our science. We must perfect its substance, and preserve (if not extend) the grace and dignity of its proportions. We must, with constancy, attend to the reason and grounds of its doctrines : first, in order thereby to do homage to and confirm its character as a science ; and next, in order to avert the evils of uncertainty in the law, which, (as Sir W. Jones said) are a disgrace, and not a glory, to the science ; evils, too, which are best avoided by frequently renewed attention to the grounds and reasons of it, and a bold and clear delineation of its principles. We shall hereby exclude the subtlety which breeds error, or (at best) unprofitable aimless speculation. We shall not be timid to take up conclusions, clear in point of reasoning, merely because we do not find in the reports of Croke, Coke, East, or Vesey, a case which precisely corresponds to that in hand. The sound and soberly deduced results of a principle should be accepted with unhesitating confidence, when we are under the protection of a system which acknowledges, so readily and predominatingly, the utility of *doctrines*.

It follows also from the consideration that we are engaged

in the profession of a science, that our attention is due to the pruning it of all unsound and unwarranted theories that may attach to or be engrafted upon it. Let us always bring our generalisations to the test of particulars; and if they cannot be reduced to these, let us acknowledge them no part of the English system, whatever place they may have in the general science of jurisprudence, or any other philosophy more comprehensive than our positive system.

It is a problem not unfrequently encountered in legal science, whether to adopt and succour a received error? or to use subtlety (involving a departure from the simplicity of previous reasonings), in order to reconcile the contrariety of the error? or, again, whether the law should be openly and boldly corrected by reference to the indisputable principles of the science? In deciding a question of this kind, we are not at liberty to disregard the consideration that it is one of the main ends of Law to quiet contentions in relation to civil rights: and, for this purpose, it is indispensable that what has become settled law should (until removed by the legislature) continue such; because, otherwise, the concerns of men could not be regulated quietly and evenly upon the faith of what has been declared to be Law. But it often happens that an unwholesome or unsound theory is propounded with a *measure* of professional sanction, which is not such as *entirely* to exclude dissent. If, then, there be a case which says that because a condition once released is wholly gone, a condition not to assign without license is extinguished by the grant of a single license to assign; or if there be a case which says that cross-remainders cannot be raised by implication in a deed, whereas they may be so raised in a will; or if there be a case which says that in determining the validity and operation of a testamentary gift, regard cannot be had to events happening between the making of the will and the death of the testator; or if there be a case which declares a trust for accumulation void for remoteness which is destructible by tenants in tail; or if there be a case which holds that an incorporeal hereditament in fee can descend to executors; or a case deciding that a contingent remainder cannot be void as a perpetuity; or a case adjudging that the wife has an equity to a

settlement out of her equitable freehold for life, or chattel real, against her husband's alienation thereof; or a case declaring that in order to support a claim of toll as a port due, it is necessary, not only that there should be a port, but that the claimant should be owner of it: if, I say, doctrines like these have appeared, let us not be prevented from candidly and frankly examining the grounds of them, but, on the contrary, remember that "a thing weakly authorised or warranted is not entitled to facility of credit."

It is our duty to watch narrowly any interference with the received language and terminology of our science. Its terms of art and its technical phraseology are of the life of the system, and, if waived or loosely and unintelligently applied, it will be but a natural transition to find the prevalent perceptions of legal phenomena becoming vague and indeterminate, and the lineaments of the system less clearly defined. Hence we may learn the mistake of attempting, by a statute, to give to contingent remainders the name and properties of executory devises. And so likewise it is a mistake to import into our system terms and phrases which, however appropriate in a more general and less technical philosophy, have yet not a definite signification, but rather (if any) a tortuous one, in the discussions of English Law. Submission to the logic and the nomenclature already existing, is here called for from every true friend to the science. Therefore, to speak of "interests limited hypothetically," when a simple "condition precedent" is meant, or to divide a well understood subject like that of "conditional limitations" into "destructive and creative," and "destructive and accelerative" limitations, — this, in my humble opinion, is not calculated to advance the science of the Law. It is clear if a man is compelled to hunt after the meaning of words, he will be in danger of missing the matter. The sign-post should not be ambiguous or perverse, if the course is not to be devious or indirect. Clearness in ideas may frequently, in reference to a *special science* like ours, depend upon adherence to language which, upon other topics, would be open to the charge of obscurity and inelegance. And, again, let us eschew *slovenliness* and *inexactness* of expression in our trans-

sactions and discussions of law. It is worse than inadvertence to speak of a limitation of personalty after a gift of it for life, as a "remainder," or of the transmission of it as "descent" or "inheritance." Why, again, should successive limitations to the possessor for the time being of a title of honour, be called a gift to a "class"?

Obligation is likewise entailed upon us in respect to the correction and augmentation of the law by scientific legislation. Amendment of the law, in many of its details, has become a necessity of the times, which lawyers, no less than society at large, have proved themselves willing and anxious to acknowledge. And it should be our aim that, when the law thus tends and provides for the moral, physical, and other interests committed to its charge, it should appear as a *science* in the provisions which are made, and the alterations which are effected, for those purposes. And it is a superintendence over legislation *past*, as well as over what is *forthcoming*, to which this obliges us. Thus, as to *existing* laws, it is an evil when a law is suffered to continue after it has become obsolete. It brings other wholesome laws into neglect and risk of disobedience. And so, again, when a law is fit to be retained, the penalty for breaking it should not be excessive; for, as Bacon says, "any over-great penalty (besides the acerbity of it) deadens the execution of the law." And in respect to *current* legislation, it should be our aim to construct the new enactments, as far as in the nature of the case may be possible, upon the principle and system, already so largely acted upon, of a science; — upon the plan, I mean, of which we have a fair specimen in the enactment recently made, that "all corporeal hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant." And in working out this idea, let us not disdain the suggestions of ordinary logic. Bacon, for instance, has told us the importance, in every science, of *middle principles*, — theories neither too contracted nor too general. And so also Mr. Mill: — "The *lowest* generalisation, until explained by and resolved into the middle principles of which they are the consequences, have only the imperfect accuracy of empirical laws; while the most *general* laws are *too* general,

and include too few circumstances to give sufficient indication of what happens in individual cases, where the circumstances are almost always immensely numerous."

As we desire the purity and soundness of our science, we must discard those vain or (as they have been well termed) "vermiculate questions, which have indeed a kind of quickness and life of spirit, but no soundness of matter or goodness of quality." Such is our question of "*Scintilla juris*" upon the Statute of Uses; and such the "possibility upon a possibility" of Lord Coke. Contentious *learning* it may be; but savouring too much of the degenerate altercation of scholasticism, to be worthy a place in the liberal and enlarged theories of English Law. Yet, let us bear in mind that, in regard to questions which are real, substantial, and solid, and which it is of moment not to leave unsettled, there is a duty laid upon us, not only not to suppress, but to examine and sift them, — to contribute, as far as in us lies, to the conclusion of the doubt. If it be a question whether the doctrine of Wild's case applies to gifts of personal estate, or whether an indefinite, indestructible power of sale is valid, it is the interest of the state, and should be the effort of lawyers, that the doubt may be no longer open than the lack is experienced of an opportunity to close it. It has more than once been shown that to probe thoroughly a doubt, is frequently to disprove its existence, or, if not, yet to enforce a particular decision of it.

Our law is of so vast an extent and of so intricate a texture, that we are bound, not only to guard the rules which belong to its particular departments, but to take note likewise of those primary or elementary principles which it elevates as prominent points in its whole system. We are not to suffer the doctrines of any one branch of its learning to undermine the collective pre-eminence of its fundamental theories; for those are the theories that connect it most directly with the great ends which, as a system of law, it has in view. And, upon the same consideration, I cannot but deem it a mistake when members of either division of the Bar confine their attention to the decisions of those Courts with which they are more immediately connected. The separation

of Law and Equity is doubtless beneficial to the nation ; but they are still parts of the same comprehensive science ; and the dignity and proportions of that science are never so clearly seen as by those who make it their business to maintain a constant intercourse with the progress of each department of our jurisprudence.

Such, then, at large is the answer which I invite you to give to the inquiry suggested at the commencement of this lecture. The reflection which it forces upon us is, that the Law is a science of incalculable value in the service which it renders to the great philosophies of human life ; and it cannot but be our aim to vindicate our position as its guardians and its ministers, by proving that we are more than hirelings. The proud pre-eminence is ours, that as the Law is a science which indispensably requires for its preservation, comprehension, and enforcement, a specially-instructed body of men, and as it is a science whose single end is to secure and augment the moral, the religious, and the material welfare of society, we— we, who compose this specially-instructed body,—stand forth in the company of the state as the direct and immediate agents of all this good which it is the province and within the power of the law to accomplish for mankind. Away, then, with the ignorance and the folly which esteems our profession an encroachment and an evil, or which associates it with the dirty schemes of chicanery and extortion ! But, then, there is still the lesson to be remembered by *ourselves*, which Lord Bacon has taught us, — “It is impossible to advance properly the science, when the *goal* is not properly fixed.”

ART. III.—ON THE DOCTRINE OF *NUDUM PACTUM* IN THE ENGLISH LAW.

VON SAVIGNY, in his great work now in the course of publication¹, observes on the advantages which accrue from a system of Law like the English, growing up independently of the Civil Law of the Continent, and developing itself from original sources. It is obvious that, where two adjoining countries, standing on the same level of civilisation, arrive by separate routes at similar conclusions in jurisprudence, a strong presumption arises that such maxims coincide with the habits, exigencies, and current opinions of the day. On the other hand, a reference from one code to the other on any knotty question that arises, and where the rule may not be quite clear, is likely to afford the jurist a different view of the subject under consideration, and an original train of reasoning which can rarely fail to be of the highest value. Again, if in any system a peculiar rule exists which is in conflict with the general doctrines of the law, it is difficult to avoid the suspicion that such *jus singulare* is unsound, unless a very strong body of local reasons can be brought forward to support it.

The doctrine of *nudum pactum* presents such a peculiarity in the English Law, and we propose to consider its origin and its propriety. The rule of the English Law with regard to the validity of contracts we may take from Selwyn²:—

“Every promise for the non-performance of which an action of assumpsit may be maintained must be founded on a sufficient consideration,—that is, a consideration either of benefit to a stranger, or of damage or of loss sustained by the plaintiff *at the request* of the defendant; and herein the Law of England adopts and recognises the rule of the Civil Law *ex nudo pacto non oritur actio*.”

¹ System des heutigen Römischen Rechts. Berlin, 1840-6.

² 1 N. P. 46., 8th edit.

So Blackstone¹, — “A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side without any compensation on the other, is totally void in law, and a man cannot be compelled to perform it. . . . And however a man may or may not be bound to perform it in honour or conscience, which the municipal laws do not take upon them to decide, certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for; and therefore our Law has adopted the maxim of the Civil Law that *ex nudo pacto non oritur actio*.”

It will be observed that both these authors, following Plowden, attribute the rule in question to the Civil Law; and Blackstone in a previous page misquotes Gravina to show that, according to the civilians, “in all contracts, either express or implied, there must be something given in exchange, — something that is mutual or reciprocal.” And thus nearly all the English text writers on contracts lay it down to their readers that the rules of the Civil and of the English Law in requiring a valid consideration for every contract are identical.

Nothing, however, can be more incorrect.² The broad doctrine of the Roman Law was that solemn compacts, not invalid in themselves, were enforceable in the legal tribunals. “*Universum autem conventionum vis eo continetur præcepto: esse servanda pacta*,”³ and Ulpian gives the all-sufficient reason, — “for what,” says he, “is so accordant to the good faith of mankind as to enforce those agreements which individuals have chosen to make amongst themselves?”⁴

That which was called *nudum pactum* amongst Roman lawyers was a peculiarity belonging to their early system, explicable on historical grounds, obviated subsequently by

¹ 2 Comm. 445. ed. Coleridge.

² The erroneous view of Blackstone on the subject of Contracts, has been pointed out by several writers; and Mr. Fonblanque, Tr. on Equ., B. 1. c. 5. s. 1., has an exceedingly able note upon it.

³ 2 Mühlenbruch, *Doctrina Pandectarum*, 230.

⁴ Dig. 2.14. 1.

the wise equity of the Prætorian Bench, and completely exploded finally in all the Rome-derived codes of modern Europe. Even according to the early Roman system, a contract was valid without consideration; and, *vice versâ*, a contract which by English Law would be perfectly binding, was with them *nudum pactum*. We proceed to establish the truth of these propositions *seriatim*.

The most remarkable characteristic of the early Roman Law was its religious attachment to forms. The jurisprudence of all early nations displays a disposition to adopt symbols and formulas, which credulity and ignorance on one side, and possibly craft and self-interest on the other, contributed to invest with awful reverence. But no nation was so prolific in its invention of legal symbols as the Roman, and probably no nation was ever more attached to the Law generally, and to the sanctity of its behests, than that great people. We may recall to our readers' recollection a few of their bizarre customs.

An action was commenced by the plaintiff addressing the defendant in person, in a set formula, "*in jus eamus in jus ambula*," and if the defendant demurred, or sought to cast an essoin, the plaintiff would call on the bystanders to witness the proceedings, and, on *touching their ears* to impress the fact on their memories, he was allowed to seize the defendant by the throat, and drag him, *obtorto collo*, before the Court. The reader will recollect Horace's description of the process: —

Casu venit obvius illi
 Adversarius; et, quò tu, turpissimè magnâ
 Exclamat voce; et, Licet antestari? Ego verò
 Oppono auriculum. Rapiit in jus: clamor utrimque.

The action *in rem* called *vindicatio*, required the enactment before the judge of a simulated struggle between the parties as to the possession; and this by the early law was required to take place on the spot if landed property were in question; but a subsequent formula modified the procedure by allowing the parties to bring a turf (*gleba*), or a straw (*festuca*), into court, to represent the *locus in quo*. The

modern jurist will readily trace the transmission of these symbolic forms to the English and French systems; to the former in which livery of seism was formerly effected by the delivery of a turf, and in French Law the transfer of property was performed by the ceremony called *effestucatio*, of which a number of examples will be found in Ducange *ad voc. Festuca*. Again, a slave was manumitted by a box on the ear, which was followed by a spinning round on his own axis; hence Persius, —

———— una Quiritem
Vertigo facit.

A son was emancipated by a form of sale being gone through, and by knocking a pair of brass scales with a small coin. The action for nuisance (*operis novi denuntiatio*) was commenced by throwing a stone against the obstruction complained of; and so for every legal act recognised by the Law Courts a symbol of some sort was devised, and a strict formula of words prescribed, the slightest departure from which was fatal to the suitor. Gaius gives an apt example of this strictness in his criticism on the over subtlety of the early Roman lawyers, on which he takes the opportunity of deriding the pedantry of the old jurists, who held that a man suing for an injury to his vines should lose his cause because he called his vines vines, and not trees; the formula prescribed in the Twelve Tables, or, as we should say, the writ in the register, being “*de arboribus succisis*,” not “*de vitibus*,” and we confess we cannot help calling to mind many decisions of the Common Law, especially in criminal cases, where the same superstitious reverence to *words*, and disregard of ideas, is displayed.

We trust, however, that the same purifying process which took place in the Roman Law before it reached the degree of excellence which it afterwards attained, is also developing itself in our own system; and that we may shortly have to say with Gaius, “*Sed istæ omnes legis actiones paulatim in odium venerunt, namque ex nimia subtilitate veterum, qui tunc jura condiderunt, eo res perducta est, ut vel qui minimum errasset litem perderet.*” — Lib. 4. § 30.

Having shown the extent to which symbols and set forms prevailed in the Roman Law, it cannot be a matter of astonishment that such important transactions as contracts should be *clothed* with an appropriate ceremony. Accordingly, as in the transfer of property, the *festuca*, or straw (if that be the meaning of the term), played its part, as in manumission the staff called *vindicta* was employed, so by the early Roman Law, to constitute a valid contract (*stipulatio*), the parties were obliged to break a straw (*stipula*) between them. This, at least, is the explanation of the term given by Isidore; and it appears to us the most probable, although other derivations are given by ancient commentators. The essential *formula*, however, in every stipulation, was that the matter of the contract should be contained in a question and answer. “Spondes ne dare? Spondeo. Dabis? Dabo. Facies? Faciam.” When this interrogation had taken place, the pact was said to be invested with an action; if the agreement did not assume such form, it was called naked, bare, and no action could be brought upon it; hence the terms *nudum pactum*, *pactum vestitum*, and the phrase quoted above, *ex nudo pacto non oritur actio*.

It is easy to perceive what the early Romans intended in prescribing this set form for a binding contract. It was an anxiety on their part to take care that men should not be drawn in by any loose expressions to contract obligations which they had never contemplated; and the rule may be called a rule of evidence. J. Voet sums up the rationale of the rule in these concise terms:—“Ne nimium restringeretur oris libertas, et imprudentiores sæpe verborum temere prolatorum laqueis caperentur.”¹ But wherever a party bound himself by the solemn ceremony of stipulation, the contract was not open to this objection, and it was enforceable against him without any reference whatever to what English lawyers call consideration. Thus, where a landlord promised to reimburse the tenant for expenses which he had laid out on the farm, the promise was binding if made by way of question and answer, otherwise it was *nudum pactum*.² And on the other

¹ Voet ad Pand., p. 166. 6th ed.

² Cod. 4. 65. 27.

hand it will be seen, on consulting the pages of the civilians, that contracts made on perfectly good consideration were still not binding unless the ceremony of solemn question and answer intervened. Thus, the following are given as examples of a *nudum pactum* by Vennius, — “Dabo tibi stichum, tu mihi Pamphilum : dabo tibi equum, tu mihi insulam facies : dabo tibi partem bonorum ut a lite disceduo.” All of which would clearly give good cause of action with us, being founded on mutual promises.

It was discovered, however, gradually in Roman Law practice, that the strict rule which was laid down for the creation of a binding contract operated evilly in allowing men to set aside solemn engagements; and we may perceive their great lawyers occupying themselves to devise means for defeating the rule. Thus it was held at an early period that although an action could not be founded on a *nudum pactum*, it was good ground for a plea in bar (*exceptio*). So also Paulus advises his readers to make use of the *stipulatio* in all compacts, “ideo omnibus pactis stipulatio subjici debet, ut ex stipulatu actio nasci possit.” (Cent. Recept. 2. 22.) Still, however, the rule remained in operation throughout the whole period of Roman dominion, and we learn from Plautus that it gave rise to ceaseless chicanery, and to the triumph, in the Roman Law Courts, of dishonest repudiators of solemn engagements.

The definition of a contract by the Roman lawyers themselves, however, contained within itself the seeds from which, by sound logic, the true doctrine would gradually evolve itself; and this we find to be the case among the civilians of modern Europe.

Ulpian defines a compact thus : “Est autem pactio duorum pluriumve in idem placitum consensus.”¹ Now, on combining this definition with the fundamental maxim above cited, and which was derived from the Prætor’s Edict, “*pacta conventa servabo*,” it necessarily follows that all the subtle distinctions drawn by the Roman laws between compacts and pollicitations, naked contracts and clothed contracts, and their divisions of contracts into real and verbal,

¹ Dig. 14. 1,2.

named and unnamed, consensual and literal, are unsound, and unworthy of a place in an enlightened system of jurisprudence. Accordingly the Dutch law¹, the French² and the German³, all accord in holding that a solemn compact made between individuals, and intended by themselves to be binding, is enforceable in a court of law; and one of the most recent practical writers of the modern German school thus sums up his remarks on the Roman doctrine as to contracts generally: "Quod ad forensem hujus doctrinæ utilitatem attinet cum jam id obtineat jus, ut sola conventio perfectam in se obligandi vim continet, sponte sequitur nullum eorum, quæ ex contrario Romanorum jure manarunt, apud nos superesse usum." (2 Mühlenbruch, *Doctrina Pandectarum*, § 344.)

Many of our readers will probably think the above disquisition a research of dry antiquarianism, and, with Harrison's Digest in their hands, will hold that it is very immaterial to ascertain what the Roman lawyers meant by *nudum pactum*, or by what modes the modern civilians have departed from the doctrine. Not altogether assenting to this conclusion, we admit that the rule as to *nudum pactum* is so firmly established in our law, that a discussion as to its propriety is likely to be much more useful than any inquiries respecting its origin. We therefore pass over the mode in which the supposed Roman doctrine found its way into our system, the misconception which Bracton (writing probably with the learning diffused in the Oxford lectures of Vacarius before him) entertained of the law sources, and the false translation, by subsequent lawyers, of the Roman "*Causa*" into the English "*Consideration*,"—and we propose to devote a few remarks as to the claims of the rule to be deemed a sound legal institute.

It is obvious that the nearer approach which a law makes to the rule of conduct dictated by a pure system of ethics, the nearer will the coincidence be between law and justice.

¹ See 1 Voet ad Pandect. p. 169.

² Pothier, *Traité-sur les Obligations*.

³ Hugo thus expresses the rule:—"In the Roman Law now in use, contracts are based on the principle that every promise, which is not in itself invalid, gives rise, so soon as it is accepted, to a binding legal obligation."—*Lehrbuch, des heutigen Römischen Rechts*, p. 249.

We mean, by justice, conformity to the sense of right entertained by the community at large, to the standard by which all our moral conclusions are governed, and the influence of which is in operation on the passing of nearly all laws. It is equally obvious, however, that moral rules extend over a much wider sphere of action than the legislator is able to include within his commandments, and that the coarse rules of the latter are necessarily restricted, by the difficulty of carrying them into execution, to the more salient and ordinary occurrences of daily life. If human laws could enforce filial piety, or gratitude, fidelity to the marriage vow and continence generally, without occasioning a preponderating amount of evil by the necessity which would thereby be generated for insufferable inquiries into private life, there is no doubt that such laws would have a sound juridical basis. As it is, the jurisprudence of civilised nations is not unanimous whether fornications or adultery should fall within the scope of the criminal law, or how far the duties recognised in the bosom of a family should become the matter of civil obligation. On every question, however, wherein a divergence exists between moral duty and legal obligations, a clear and convincing statement of reasons should be capable of being given to account for it, and in so far as these reasons demonstrate the inexpediency for enforcing the moral rule will this divergence be deemed satisfactory. We may see herein in what the pre-eminence of one code of law over another consists; for although all will agree in their conclusions as to great landmarks, still, as to the nicer shades of human conduct, where a balance between convenience and inconvenience has to be struck, the same diversity will prevail as between individual reasoners; and accident, prejudice, or caprice will often succeed in investing some vain jingle of words with the solemnity of a legal axiom. In every case, therefore, wherein a claimant for justice is informed that in the *forum conscientiae* his plaint is valid, but that no redress is open to him in a legal tribunal, it is incumbent on the jurist to explain why it is that his laws withhold relief. Let us see now what are the juridical grounds assignable for the refusal of an English Court of Law to enforce a solemn pro-

mise, which is in conflict with no principle of public policy, and which accords with every dictate of private morality.

We are unable to perceive any other ground for the doctrine of *nudum pactum* in the English Law than that already cited from Voet, and which, before him, was assigned by the Roman lawyers in behalf of the expediency of a certain set form or clothing for contracts. It is undoubtedly expedient that the "*oris libertas*" should have a certain range, and that every loose word spoken should not be capable of being laid hold of as the ground of a legal liability. Thus in the instance given by Pothier of a father's promise to his son of an allowance whilst on his travels, it would clash with the moral sense that the son should thereby acquire a cause of action, and be enabled to drag his father into court on the allowance being stopped. But this reasoning is not co-extensive with the proposition which we are considering; for, by the hypothesis, it is only *solemn* promises of which we are examining the binding force. Whether a promise was solemn or made in mere levity of speech, absolute or contingent on a number of circumstances fully in contemplation of the parties, is a question that would have to be determined by the jury or other tribunal before whom such a question should be raised. We must suppose, in the present case, such a solemn promise as lately came before the Court of Queen's Bench¹, where two parties living together in concubinage and repenting of their course of life, the defendant promised the woman that on their separation, if she would lead a virtuous life for the future, he would make her a certain allowance. In such case there is no ground for admitting allegations of surprise, unmeaning speech, words spoken in joke. The woman, possibly, had been the victim of the defendant's arts; sound morality evidently would dictate the compunctious feeling which sought to terminate the connection, and probably the promise in question afforded the only human mode by which a recurrence to a virtuous course of life was feasible. If the English Law pronounces such a promise to be void, as it did, we repeat the obligation is incumbent on jurists to explain the rationale of the rule.

It is sufficient for the busy practitioner to cite the last case in point, and *nudum pactum* may be bandied between the Bench and the Bar till an all-sufficient reason is found for the immediate decision. But such reasoning will not satisfy the philosophical jurist, the thoughtful bystander, or the "gros bon 'sens" of mankind. In the concourse of distinguished foreigners whom late events have driven to England, we can easily imagine that M. Guizot, or the late Minister of Justice, may have spent a morning in the Court of Queen's Bench whilst *Beaumont v. Reeve* was in a course of decision, and we feel no doubt that the courtesy of the Lord Chief Justice would have accommodated the enlightened visitor with a seat on the Bench. The arguments would have been duly listened to, wherein it was propounded that every contract by the law of England requires a consideration; that moral obligation does not constitute consideration; that this promise, therefore, was *nudum pactum*, and accordingly, as by the rule of the civil law, *ex nudo pacto non oritur actio*, and on the same arguments being re-echoed by the Bench, the stranger in all humility of travelled wisdom, would bow in silence to the dictates of a municipal law which he was not acquainted with. But suppose, when the bustle of the day was over, that Lord Denman, having doffed the ermine, should take the philosophic foreigner home in his carriage, and should be interrogated by the latter as to the reasons of the decision which he had just heard propounded. In such an argument it would not suffice to cite the last case in A. & E., or a note of the reporters in B. & P., it would be felt that the occasion required sound juridical reasons to satisfy the matured understanding of a profound legislator, and that the propriety of the rule as well as its existence would have to be maintained.

If the rules of English Law required that the promise in question should be clothed in solemn form, should be under seal, for instance, the foreign jurist would be satisfied; but he would hear that no prescribed form existed, and that, except in certain cases specified by the Statute of Frauds, contracts might be made by word of mouth as well as by writing. He would also learn with astonishment that although no solemn

form was required for the efficacy of such a contract, still, if the promise in question had been contained in writing, and a wafer had been affixed at the bottom of it, the law would then have enforced the obligation, because a consideration would be implied.

The author of "Civilisation in Europe" might reply: "I am unable to understand this reasoning. I have always deemed it to be the duty of Courts of Justice to enforce solemn engagements which one man makes with another, and which do not clash with morality or the public interests. As it is difficult to ascertain in Courts of Justice what the contracts are which men have entered into, different countries have established different rules respecting the legal evidence which is requisite to prove them, and our French law possibly goes further than yours in demanding 'la preuve par écrit,' and in excluding oral testimony. But wherever the fact appears uncontested of a solemn promise having been given, and which is not open to any of the objections that vitiate contracts generally, I cannot comprehend the ground for the refusal of a Court of Justice to execute it. What you call consideration I am unable to translate into French: if you mean by it that the party making the promise must have some equivalent, a *συμβαλλανμα*, such as Blackstone and some civilians allude to, I understand that your law, like ours, repudiates the notion, for it fully recognises unilateral contracts like guarantees and others. If, again, consideration means motive, it is obvious that the party making the solemn promise must have had adequate motive in his own estimation for the act in question, and I hold it unwise for the Legislature, in such cases, to interpose with the voluntary acts of individuals. Besides your law appears to be inconsistent in this respect; for although it requires consideration, that is, either an equivalent, or a motive, which the Law recognises, it does not inquire into the adequacy of the consideration; and herein differs from the Roman Law when it affected to set aside the solemn engagements which parties had contracted with one another: but what chiefly strikes me, sitting as a foreigner in your Court, is the contemplation of the effects which such a decision as I heard to-day must produce on the

crowds whom I saw assembled there. A Court of Justice is often called a school of morality, and wherever it enforces the solemn dictates of honesty and good conscience, bringing down the arm of the law on chicanery, falsehood, and crime, I admit that an ethical lesson is administered to the community in its most impressive form. But exactly in the same proportion that moral indoctrination proceeds from a Court of Justice when the decisions of the law are found to lend a sanction to pure ethics, does demoralisation in a community take place when the rogue is discovered to succeed, and the honest man is discomfited. The latter process is probably the more rapid in its course, for the most keen-witted observers of the proceedings of Courts of Justice are often those who carefully watch every advantage which the imperfection of human institutions enables them to take over their fellow men. I have studied the law too deeply, I know too well the value of skilled interpretation, bold advocacy, and careful preliminary inquiry, to join in any of the vulgar diatribes against professional agency which are sometimes heard in the present day; but at the time of life which your lordship and myself have attained, we have become acquainted with too many different systems to overlook the fact, which is apparent in all of them, that a complicated system of jurisprudence does produce a class of individuals who thrive by its defects, and whose business it is to assist in the promotion of chicanery."

We are unable to carry this dialogue any further, because neither our own reasoning powers, nor our law books which treat of *nudum pactum*, enable us to put into the mouth of the noble and learned Chief Justice any arguments that his lordship would probably choose to father. We will therefore simply address a few words to the objection which may be made, and which we have already noticed as to the *cui boni* of a disquisition like the present. It may be said that even supposing the above views are sound, and that it would have been more expedient to have held in the first instance that a solemn promise not made under duress, or extorted under any circumstances, such as in Equity would invalidate an otherwise binding agreement, should be enforced in Law, still

the rule is too well settled now to allow of discussion, and professional readers, who alone occupy themselves with legal disquisition, will as little meddle with the inquiry as Messrs. Taper and Tadpole would with a discussion among the junior clerks of the Treasury as to the expediency of beheading Charles I. The answer to this objection is twofold : — First, if the expediency of any legal doctrine be brought in question, it is eminently a question for professional discussion. So soon as a rule laid down in former times is found to operate evilly for the community, the office of the legislator is required, or ingenious interpretation to give it the go-by must be supplied. But all experience teaches that rash and hasty interference by the legislature in the department of Civil Law is unwise, and that the slow evolution of sound doctrine, as determined by the application of judicial decision to the actual business of mankind, is infinitely preferable. Certain rules, however, are so hallowed by precedent that they are without the domain of judicial authority ; and it remains only for lawyers, if the rule in question requires alteration, to point out the course which may be safely followed by the law maker. Continuing, then, the supposition that the arguments are sound in behalf of assimilating the doctrine of *nudum pactum* in the English Law to the rule of continental codes and of sound morality, an inquiry like the present may well raise the question as to the facility with which the legislature could make the alteration. For all practical purposes, possibly a slight alteration in the Stamp Act would have the effect required ; an enactment, for instance, that every written instrument, containing any promise, might be stamped as a bond, and should have effect given to it in Courts of Justice as if it had been originally under seal, would, by the technical rule applicable to consideration, get rid by a side wind of the peculiarity as to consideration in contracts which now exists. Such an enactment would be similar to Paulus's device for constituting every pact a binding stipulation ; and it is remarkable that the suggestion we are now making was at one time on the point of being accomplished by the Common Law, as a very able judgment of Wilmut, J. 3 Burr. 1670, laid down the doctrine that wherever the promise was

in writing, no ground for the objection of *nudum pactum* existed. Whether or not the evils which attend the present doctrine, the *dignus vindice nodus*, exist or not, is a question to be raised in discussions like the present.

But the second answer to the objection comes more immediately home to professional readers. The answer as to what the Law is on any particular question is often only to be ascertained by an inquiry as to what the Law *ought* to be. So long as the doctrine in any particular maxim is received undisputed, it is the character of legal deduction to push it to all its consequences. But if the rule is perceived to be peculiar, resting on reasoning once deemed sound but now exploded, it is confined within the strict limits and terms wherein it was first enunciated. The civilians have a wise maxim, "*jus singulare ad consequentia non producitur*," and our system presents many instances of a similar doctrine, though we have no concise expression for it.¹ But with *nudum pactum* we find that the course of decision in the Law Courts has been continually extending its domain. Thus the reporters, in a note to *Wennel v. Adney*, 3 B. & P. 249., have argued very subtly that moral obligation constituted no ground for a binding promise, and they cite a case by which the logical deduction appears. Mr. Baron Parke, by a dictum in 9 M & W., 496., propounded the same doctrine, and the Court of Queen's Bench, in *Eastwood v. Kenyon*, 11 A. & E., 438., and in *Beaumont v. Reeve*, gave effect to the reasoning, and embalm it in decision. A contemporaneous Court of Law would probably think itself bound by the precedent, and posterity would bow to the inflexible rule laid down by the *Books*. But if the soundness of the original rule had been juridically canvassed, one or two authorities in early books might have been easily set aside as Lord Mansfield did on a similar occasion, when *Siderfin* and *Keble* were cited as precedents for some narrow and technical decision. Our Courts of Equity have not followed the doctrine of the Courts of Law as to *nudum pactum* into all its

¹ We remember a saying in Westminster Hall, attributed to a learned Judge, respecting *Lucas v. Nockells*, that he should only deem it applicable where the plaintiff was named Lucas and the defendant Nockells.

consequences blindly or subserviently, and as to many of its phases it is still an open question, and the philosophic tone of mind, and bold spirit of inquiry which distinguishes many of our best Common Law judges in the present day, and which is ever compelling them to place the foundations of the law on such rational and fixed principles as shall entitle it to the denomination of a science, make it possible that even at law the ill-understood cantilena "*ex nudo pacto non oritur actio*," will be reduced to its proper proportions, and no longer be made an instrument for the dishonest to defeat their solemn engagements.

ART. IV. — LAW OF REAL PROPERTY IN SCOTLAND.

1. *8th and 9th Vict. cap. 31. An Act to facilitate the Transmission and Extinction of Heritable Securities for Debt in Scotland. 30th June, 1845.*
2. *8th and 9th Vict. cap. 35. An Act to simplify the Form and diminish the Expence of obtaining Infestment in Heritable Property in Scotland. 21st July, 1845.*
3. *10th and 11th Vict. cap. 47. An Act to amend the Law and Practice in Scotland as to the Service of Heirs. 25th June, 1847.*
4. *10th and 11th Vict. cap. 48. An Act to facilitate the Transference of Lands and other Heritages in Scotland, not held in Burgage Tenure. 25th June, 1847.*
5. *10th and 11th Vict. cap. 49. An Act to facilitate the Transference of Lands and other Heritages in Scotland held in Burgage Tenure. 25th June, 1847.*
6. *10th and 11th Vict. cap. 50. An Act to facilitate the Constitution and Transmission of Heritable Securities in Scotland, and to render the same more effectual for the Recovery of Debts. 25th June, 1847.*
7. *10th and 11th Vict. cap. 51. An Act to amend the Practice in Scotland with regard to Crown Charters and Precepts in Chancery. 25th June, 1847.*

In a late Number we examined the recent statute amending the Law of Entail in Scotland. Although the acts the titles

of which are prefixed to this article preceded that statute, we gave the latter the preference, both as it exhibited a more complete example of remedial legislation, and as it had attracted more of the public attention. After having given a condensed view of the law of real property in Scotland and the relative system of conveyancing, we will now state the purport of the amending statutes and indicate the farther changes which we think deserve consideration. As the amending statutes do not render the alterations imperative in the great majority of cases, but leave it optional to resort to the older law, we will in our outline deal ordinarily with that law as in existence.

In Scotland the system of the rights of real property is in accordance with the strict principles and forms of the feudal law. This criterion applies equally to the primary rights of property and to rights in security. All lands are, in the first instance, held immediately of the Crown, and a crown charter followed by sasine constitutes the right of the tenant *in capite*. Sasine is the delivery of possession effected by different symbols as applicable to different kinds of property. It is given before witnesses, and the only evidence of it is an instrument prepared and authenticated by a notary public. These instruments must be recorded in a public register, and the date of registration forms the rule of preference in competition.

The power of sub-infeudation exists to the same extent as it did in England prior to the statute of *Quia Emptores*. No limits are set to it by the law; and, where either the tenant *in capite* of the Crown or the subordinate vassal does not retain the property, his sub-vassal holds the land under the like form by charter and sasine vouched by the like evidence. In each gradation downwards from the Crown to the holder of the *dominium utile* or property, the feuar or grantee is the vassal of the granter, and is liable to him in an acknowledgment by service or payment conformably to the nature of the tenure. The granter is styled the superior, having the *dominium directum* merely, while the immediate right of the use and enjoyment of the property belongs to the vassal.

Previously to the middle of the last century, although

other tenures were recognised, ward-holding or military service constituted the tenure strictly in accordance with principle. From causes which will be noticed hereafter, ward-holding was abolished by the 20 Geo. 2. c. 50. With the exception of the udal lands of Orkney and Shetland, and a few other unimportant instances, all of the lands in Scotland are held of a superior by one of the three following tenures. 1st. *Blench-farm*—where, in lieu of services or valuable payment, the *reddendo* consists of a mere acknowledgment; 2ndly. *Feu-farm*—where the return is a fixed yearly rent in grain or money or the performance of services; or, 3rdly. *Burgage*,—which exists only in royal burghs, and extends to the lands and houses within the boundaries prescribed by the charter of the burgh. To that tenure the service of watching and warding is incident, combined in some cases with a small payment to the Crown called burgh mail.

In addition to these certain rights, the superior has, in blench and feu tenure, contingent rights, which are styled casualties. There are no casualties in burgage tenure. The tenures of blench and feu present three casualties:—1st. Relief; 2ndly. Non-entry; and, 3rdly., into Liferent escheat; the details of these it would be needless to enter. Besides these there is a statutory right, not strictly a casualty, but of more practical importance. The superior has a right to draw one year's rent, or, in certain cases, one year's feu duty, on the entry of a singular successor, viz. a purchaser or person acquiring otherwise than as heir.

For the purpose of enforcing these rights the superior has several remedies. The superior may, by process, take possession of the lands, disregarding subordinate feus which he has not recognised; he may sue for forfeiture of the right *ob non solutum canonem*; and he may sue the tenants for the arrears of feu duty, or levy them by distraining; or he may proceed by a personal action against the vassal; or resort to a right of hypothec or distress similar to that of a landlord against his tenant.

In the transmission of property the concurrence of the superior is indispensable. His precept or mandate is the only warrant for the renewal of the title in the person of the heir.

Where a proprietor conveys his estate to a third person he does so by a deed which is called a Disposition. He may so convey it to be held under himself; but he cannot substitute another as vassal to his superior without the superior's concurrence. In order to effect such a substitution, he grants a procuratory or mandate of resignation embodied in the disposition, by virtue of which the estate is resigned to the superior, in order that he may grant a new charter in favour of the disponee of the vassal: Or a precept or mandate of sasine may be granted, infestment on which, confirmed by the superior, has the same result. Where the superior acquires the property from the vassal it is resigned into the superior's hands *ad remanentiam*, so that the subordinate estate is merged in the higher.

As the superior might be absent, or incapable, or even unknown, it became of importance so to frame the conveyance as to secure to the disponee an immediate right to the property independently of the superior's concurrence. This is effected by the grant of a deed, deemed of much importance in the law of Scotland, which is called a conveyance *a me de superiore meo vel de me a superiore meo*, or, as abbreviated, *a me vel de me*. The property is thus conveyed to be holden in either of two ways, namely, of the disponent's superior or of the disponent himself. In the former case it is to be holden as the disponee had held it, and in the latter case for an illusory duty with an obligation to relieve the disponent of his obligations to the superior. The precept or mandate so framed is styled "indefinite," and the law construes the infestment upon it to be an infestment held of the disponent but capable of confirmation by the superior. When confirmed the tenure is as effectual as by a new grant on resignation. This mode of conveyance is sometimes styled a conveyance by a double or alternative holding.

Where the vassal desires the concurrence of the superior he possesses the power of compelling him to concur and grant an entry under process issuing from the Court of Session. This remedy was not obtained until 1748, under the statute of 20 Geo. 2. c. 50. In execution the remedy is imperfect and attended with difficulties.

In burghage tenure there is much more simplicity. The

bailies of the burgh act as the commissioners of the Crown, and individual proprietors, through infeftment given by them, hold directly of the Crown without any *reddendo* or casualties separate from those exigible from the burgh in its corporate character. As the corporation never dies, and cannot transfer its corporate rights, the fee is always full; and there are therefore no feu duties, or casualties, or alternative holdings.

As in the transmission of real property *inter vivos* feudal principles and feudal forms prevail, so do they likewise in its transmission from the dead to the living. This transmission is effected by a procedure styled a *service*, or, in the case of a subject superior, without a *service*, and by a mandate called a precept of *Clare Constat*.

In the branch of the law relating to services, the amending acts make several imperative alterations: in some respects the adoption of the altered form is optional, and in other respects it is declared that the law is to remain unchanged. In order to extricate this complication, we will deal with the first and most important department as matter of history, and with the other department as existing law.

A service is either special or general. The former where the ancestor's title has been completed by sasine, and the latter where it was personal. Brieves issuing from Chancery originated the procedure in both cases. In both services the death of the ancestor at the faith of the king, and that the claimant was the next and lawful heir, formed matter of inquiry. But in the special service there were various other points as to which inquiry was to be made. These brieves were directed to the sheriff, to whom, after certain notices, they were presented, and an inquest or jury having been sworn, the claimant adduced the evidence establishing the points which he had to prove. If the verdict negatived the claim, nothing followed. If it was affirmative, the verdict was signed by the chancellor (foreman) of the jury and by the judge, and the claimant took Instruments. A Latin document (reciting the verdict), termed a *Retour*, was lodged in Chancery, where it was recorded. Where the lands were

held of the Crown there was issued from the Chancery a separate writ bearing a precept of sasine founded on the retour. The precept was directed to the sheriff of the county, and on it infeftment was taken which completed the heir's title. It is still optional to obtain a precept from Chancery. In burghage holdings there is analogous procedure before the Burgh Court, of which, however, the intervention of a jury does not form an indispensable part. Where the lands are held of a subject superior, he, on production of the service, will grant a precept of *Clare Constat*, which is so styled because it bears that the superior is satisfied on the points necessary to be proved under the special service. And on that precept the heir is infeft. If the superior should refuse, the heir must proceed conformably to the remedies afforded by the 20 Geo. 2. c. 50.

Where the title of the ancestor was personal, namely, resting on a disposition with procuratory and precept, the retour or decree of the general service transmits the right, and the heir completes his title on the procuratory or precept.

The same feudal principles and forms pervade the law governing the accessory and superinduced rights of security which require for their constitution and transmission every thing which is necessary in a proprietary title. There are different forms known to the law. Of these some are obsolete, and others very seldom used; and the ordinary mode is by a heritable bond and disposition in security. By it the debtor conveys his estate to be held of himself or his superior in favour of the creditor in security of principal and interest, with a power of sale to be exercised after certain notice and with certain precautions for the protection of the debtor, to whom the creditor is accountable for any surplus of the price. On this disposition the creditor is infeft, and the sasine is recorded: and thus there is created a public register of all such burdens on real property. In the transmission of the right to another creditor by assignation (assignment) the same forms are to be observed.

Advantages of no ordinary kind undoubtedly flow from this

system of the constitution and transmission of the rights of real property. Throughout it is consistent and well defined, and possesses flexibility in its mode of operation. It is very effective in the creation of variety of estate and of reservation of interest, and of conditions or limitations, or of burdens in favour of third parties. We do not include under the advantages of feudality the excellent system of registration which is established in Scotland, as it was gradually superinduced by statute, and would have been equally effective under laws founded on a different principle.

But these advantages are more than counterbalanced by serious evils. A purchaser of land paying a full price, and therefore entitled to the unlimited property, is, contrary to the true nature of the transaction, transformed into a feudal vassal, and subjected to the casualties and to the expensive forms and intricate subtleties which are inherent in the system. Of these, some of the most usual and most pernicious arise from the creation, through sub-infeudation, of intermediate nominal estates, which may, with the concurrence of the superior, be extinguished in different ways; but, as there is seldom a direct interest to extinguish them, they multiply in the course of successive transmissions. In consequence, the titles become perplexed, and their adjustment requires much care and cost. Any error in dealing with these nominal estates would be fatal, and therefore the settlement of the title demands not only many expensive deeds, but great skill in the conveyancer, and in some cases, costly judicial procedure. If the disadvantages are forcible as applicable to proprietary rights, they are still more so as applicable to rights in security; "for here," to use the words of an ingenious law reformer of the last century, "a man who hath no intention but to obtain a real security for his money is transformed, by a sort of hocus-pocus trick, into a servant or vassal either of his debtor or of his debtor's superior."¹

The practical evils inherent in the system were perceived by the jurists of the seventeenth century by whom important reforms were proposed. The most eminent of them, Lord Stair, in a passage which we will specially

notice hereafter, suggested the abolition of sub-infeudation on the principle recognised in the English statute of *Quia Emptores*. Notwithstanding the weight which must have attached to his authority, no change was effected, and all of the evils continued in operation until they were partially cured in the earlier part of the eighteenth century. The unsuccessful rebellions of 1715 and 1745 were the immediate causes of material improvements on the law of real property as between superior and vassal. In the former year there was passed the statute of 1 Geo. 1. cap. 20., ordinarily called the "Clan Act," by which the power of the superior over the vassal was much weakened, especially by the abolition of obnoxious personal services. That statute, although framed to accomplish only an immediate object, pointed the way to those more substantial and permanent improvements, which were the result of the rebellion of 1745. By the Act of 20 Geo. 2. cap. 50., the tenure of ward was abolished, and was converted into blench and feu holding; the casualty of non-entry was regulated; the casualty of escheat was, in certain cases, abrogated; to heirs and singular successors there was given a summary process against superiors to compel entries; the attendance of vassals at Head Courts was discharged, and the services of tenants were ascertained. The beneficial results of that statute received important collateral aid from the noted measure of the same year, ordinarily styled the "Jurisdiction Act," by which the heritable jurisdictions of the great landholders were abolished, and the vassalage freed from the severe and pernicious restraints which these had imposed. Notwithstanding the obvious advantages which these changes were fitted to produce, the spirit of rigid feudalism was, at that time, so prevalent in Scotland, that many viewed them with jealousy and distrust; and it was even argued that the infringement on the feudal holdings and jurisdictions "may be dangerous to our happy constitution."¹

Although this zeal for the rigours of feudalism soon abated, yet the admiration of jurists for feudal forms and subtleties

¹ Essay on Feudal Holdings, Superiorities, and Hereditary Jurisdictions in Scotland.

remained in force by reason of the direction which was given to the more important objects of forensic and judicial inquiry. "The numerous forfeitures which followed the rebellions of 1715 and 1745, gave rise to a multitude of difficult questions of high interest relative to the connection of superior and vassal; the nature and efficacy of destination in deeds of entail, and the force of real securities over land. All the learning of the feudal law came more immediately to be called into use; and the professional success, as well as the character of the lawyer, was estimated chiefly according to his skill in the law of heritable property."¹ At a subsequent time, the numerous questions which arose out of the law of elections produced similar results. The elective franchise in counties was vested exclusively in the immediate vassal of the Crown, although he had no interest in the land, and held a bare superiority. Political influence was maintained by the creation of votes effected by parcelling out superiorities in different technical modes. For the purpose of working this system, the feudal forms and rules were preserved in full vigour, and the most subtle refinements were devised. A remarkable exhibition of these feudal intricacies is to be found in the Reports and in the treatises on the elective franchise. If the love of system, and the astuteness thus created had been confined to the more immediate object, they might have been comparatively harmless; but unhappily, their effects extended to all estates of superiority. From these causes, combined with the symmetry of the system and some good qualities, the idea of the necessity of conformity to the feudal rules became inseparably interwoven with the law of real property. The identification at that time of the bar of Scotland with the landed proprietary, and the intimate connection of all of the law practitioners with the same class, operated powerfully in extending these views, and in impressing the community with respect for feudalism. This bigotry was not, however, absolutely without exception. Lord Kames exposed the evils and anomalies of the system with acuteness and force; and he sums up his analysis by quaintly observing that "when the substantial part of the

¹ Bell, in Preface to Commentaries on the Law of Scotland, p. x. xi.

feudal law has thus vanished, it is dismal to lie under the oppression of its forms, which occasion great trouble and expense in the transmission of land property.”¹

After a considerable lapse of time, public attention was, by a combination of causes, awakened to the evils inherent in this system of land rights, and reform was pressed on the attention of those intrusted with the administration of Scotch affairs. The great expense attendant on the formation both of proprietary titles and of rights in security, the embarrassments and dangers which accrued from subtleties, the grave and numerous errors which ensued, the oppressive use of the feudal forms which was occasionally made by superiors themselves, but more frequently by interested or speculative practitioners of the law, and the fetters which were thus imposed both on the transfer of real property and on the power of borrowing, had been gradually creating the conviction that there was in the system much which was pernicious. But the more immediate impulse was given by the alteration which was made on the elective franchise. By the abrogation of superiority as the basis of franchise, it sunk immeasurably in importance in estimation. Formerly, by reason of the political power which superiority conferred, it formed an estate for which a high price was realised; but, by the change, it had, in the great majority of cases, become devoid of value, as the estate was reduced to the casualties, which were often purely nominal. In combination with this, it was foreseen that the intricacies and other difficulties attendant on the completion of the feudal title would increase in number and frequency; as the holders of crown superiorities,—a large body in the country,—would cease to make up their own titles, and thus render the completion of the titles of their vassals practically unattainable. In compliance with the known wishes of the community, Commissioners were directed to inquire into the state of the law of real property, and to make suggestions for its amendment. After having examined numerous witnesses, the Commissioners made an able Report², of which we have availed ourselves. The principles of the law and its

¹ Historical Law Tracts, p. 177.

² Report of Law Commissioners on Conveyancing, 1838.

actual state are analysed ; its advantages and defects are developed ; suggestions for improvement are in part rejected and in part adopted ; and a series of amendments, in the form of substantive propositions, is presented as the result. The principle sanctioned is, that the feudal doctrines and rules, including indefinite sub-infeudation, ought to be retained ; but that they should be modified by abrogating the more obnoxious tenets and results, by pruning excrescences, by abolishing cumbrous and useless ceremonies and observances, by abridging forms, and abbreviating phraseology. By thus effecting a saving of expense and the removal of much intricacy and embarrassment, the facility of transaction would be greatly promoted. For carrying these objects into execution, the propositions were so framed as that a greater or smaller number of them might, at any time, be made effective, and thus a system of amelioration might be cautiously kept in progress.

Several years after the date of the Report, bills containing specific propositions recommended by the Law Commissioners were promoted by the late Lord Advocate of Scotland, and by the present, and became law by the statutes, the titles of which are prefixed to this Article. We do not mean to attempt an analysis of the provisions of those statutes, for as they consist chiefly of the retrenchment of redundancies and of the introduction of improved machinery and phraseology, so much minute technicality exists, as to preclude even a condensed view of their contents. Little more than their spirit and general intendment can be given ; and this, we think, will be sufficient to show the nature and extent of the valuable alterations which they have made. We will not examine them chronologically ; but regarding them as parts of a system, we will endeavour to trace the bearing of each statute on the others and on the system. As we mentioned at the outset, the adoption of certain portions of the amended system is not imperative ; although undoubtedly it will be well to comply with it, unless there shall, in special cases, be strong reasons for adhering to the older forms. We greatly doubt the soundness of the course which has been adopted in leaving

the older rules and forms unrepealed. A statutory system of conveyancing ought to be precise and exclusive. In practice, perplexity may be produced by the occasional or partial use of the older forms by reason of supposed expediency. And where a less costly system has been substituted, the temptation ought not to be left to the unscrupulous conveyancer to force compliance with the expensive forms. We are not sure of the reason for giving the alternative; but we believe that it was a sacrifice to the spirit of false conservatism.

In analysing the amending statutes, we will begin with the 10 & 11 Vict. c. 51., which governs the practice with regard to Crown Charters and Precepts in Chancery. The statute allows the fabric to remain untouched, but clears away much rubbish with which it was encumbered. Formerly it was necessary to pass in Exchequer a writ styled a Signature, on which a precept was issued, as preliminary to the grant of a charter from the Crown. These steps are abolished, and a charter is now obtained by lodging in Exchequer a draft of the charter, along with the title-deeds. And after revisal and subjection to certain forms, the charter is framed in Chancery. Antiquated ceremonies, and the use of the Latin language are abolished; conditions of entail and real burdens may be referred to as already in the registers; and schedules embodying forms are annexed.

The statute thus dealing with the fountain of land rights is, when viewed systematically, followed by the 10 & 11 Vict. c. 48., being an act to facilitate the transference of lands and other heritages not held in Burgage, or in other words, the great mass of landed property. The essence of this statute, as of the former, consists of the substitution of abbreviated forms and clauses contained in schedules, of explanations of the import of clauses, of powers of referring to the registers for conditions of entail and real burdens, and of a provision that a charter of confirmation in the scheduled form shall imply a general confirmation of all the title deeds of the lands. Provisions are then inserted containing machinery for compelling superiors to enter vassals, being a great improvement on the cumbrous and ineffective modes formerly in use. And the statute concludes with regulations

applicable to a particular process by which a creditor can obtain a judicial title to his debtor's lands. In connection with this statute must be taken the 10 & 11 Vict. c. 49. which enacts, with relation to lands in Burgage tenure, provisions of the like nature *mutatis mutandis*.

Although prior in date, the statute simplifying the form of obtaining infeftment, 8 & 9 Vict. c. 35., must, as one of the legal series, be deemed subsequent to the statutes already noticed. The provisions of that statute involve important improvements. The precept or mandate of sasine was formerly a command by the superior to his bailie, to give to the vassal "heritable state and sasine real, actual, and corporal possession" of the lands conveyed by delivery of certain symbols on the ground of the lands. It has been changed into an authority in general terms to give sasine to the vassal, and in place of an enumeration of burdens and restrictions, the precept at the close contains a reference to them as before specified. This form is set forth in a schedule. The ceremony of taking infeftment before witnesses is abolished, and there is substituted the registration of an instrument of sasine (conformably to a schedule) which may, at any time, be put on the record. The date of the presentment for recording is to be deemed the date of the infeftment; and in case of any error or defect, another instrument may be recorded. The forms of Burgage sasines remain as formerly. The result of this statute has been to place the sasine in the precise position in law which it has long held in practice. It is a declaration publicly recorded that the superior or disponer has granted a right to certain lands, and that as concerns third parties the right is completed of the date and by means of the registration of the instrument. We entirely concur in the reasons which induced the Law Commissioners to retain the instrument of sasine, and to record it in place of the charter or disposition which forms its warrant.¹ Some advantages would have accrued from recording the warrant; but they would have been more than counterbalanced by disadvantages. Nothing should enter the record but what the law requires to be published either as constituting the

¹ Report on Conveyancing, pp. 93—97.

primary right or as burdening it. And many deeds contain conditions and stipulations creating personal obligations, not intended to qualify the real right.

These statutes exhaust the new enactments relative to proprietary rights as *inter vivos*; and the 10 & 11 Vict. c. 27. amends the law and practice as to the service of heirs. As we have already indicated, briefs from Chancery are abolished; and the service now proceeds on an application to the sheriff of the county or to a functionary who has been newly created, called the sheriff of Chancery, whose jurisdiction extends over Scotland. The forms are abbreviated agreeably to schedules; the jury is abolished; the evidence is received by the judge, whose decision may be reviewed by the Court of Session, either in the case of his refusing to serve the applicant or where there are competing parties; and if necessary a trial by jury may be ordered. The judgment of the sheriff, either original or as conformable to the instructions of the superior court, is to be recorded and to have the effect of a *retour*. Where the lands hold of the Crown infeftment may be taken on this decree or (as we formerly mentioned) on a precept from Chancery. In dealing with this matter certain provisions of the Crown Charters Act must be taken in combination with the provisions of this statute. Precepts of *clare constat* from subjects superior, and entries of heirs in Burgage tenements continue unaffected.

The statutes of 10 & 11 Vict. c. 50. and 8 & 9 Vict. c. 31., facilitating the constitution, transmission, and extinction of heritable securities for debt, are framed on the same principle as those relating to proprietary rights. Bonds and dispositions in security are to be granted in a scheduled form; explanations of the clauses are given; regulations are made as to registration and the criterion of preference in competition. The effect of sales, the obligation of the creditor to account, and the disencumbering of the lands, are likewise regulated. Transference is to be by registered assignation, and assignations are to be preferable according to the dates of registration. Renunciation is to be according to a scheduled form and by recorded discharge. Both of the statutes provide that the forms previously in use shall be competent.

By the combined operation of these statutes sasine is abolished as a step necessary for completing the right of the creditor in a proper bond and disposition in security, and in transmitting the right of the holder of a heritable security in whatever form it is constituted.

We have repeatedly referred to the schedules appended to the series of statutes. Opinions have been indicated that the precise forms and words of the schedules are not imperative, as the statutory phraseology is "in the form or as nearly as may be in the form." But it is understood in practice that the deviations should be as few and as seldom as possible. This view is in accordance with the intendment of the statutes, and with the phraseology as applicable to the larger portion of the schedules. But a difficulty may arise in its application to certain of them. Independently of the ordinary interpretation clauses, specific sections contain explanations of the import of the schedules. These explanatory sections are of the essence of the statute, admit of no deviation, and are imperative. But it must be assumed that the precise form and words of the schedule must always be used; for to them only the explanations can be applied, and a deviation would take them out of the section and leave them open to the common rules of interpretation. While we approve of statutory forms serving as guides but admitting of latitude, we doubt whether it is advisable to render them thus stringent by combining them inseparably with the enacting clauses. This presents an important question in the details of legislative machinery and phraseology, and it would require serious consideration how far it should be sanctioned as one of those changes in this important department which are now in progress, and which are, confessedly, so needful.

No doubt can exist of the importance of these amendments on the law of real property. They have been highly appreciated in practice, and have been adopted by conveyancers, with the exception of a very few instances, in which the heir under a Crown-holding has resorted to the old form of procedure.

But valuable as these improvements are, and although

they may, for a time, be deemed sufficient, yet they ought to be considered as merely the first movement of the machinery of amelioration. Even within the very prudent limits prescribed by the Report of the Law Commissioners, there are propositions for extensive and beneficial alterations which we trust will soon become law. Two of the more important of them will be mentioned. *First*, it is proposed that in place of the actual concurrence of the superior in charters of resignation and confirmation, confirmation should be implied *ipso jure*; and, *secondly*, that casualties, and the right to composition should be discharged on purchase by the vassal or on commutation for an annual payment, which purchase or commutation should be competent on the requisition of the superior or of the vassal, and that a discharge of it should operate as an absolute disencumbrance. Following the precedent of the 20 Geo. 2. c. 50., the Court of Session should have the power of framing the rules according to which the respective interests of the parties are to be adjusted.¹

Even these reforms would however, as we think, be insufficient. We feel the delicacy of differing from the Law Commissioners, and especially of indicating the adoption of suggestions which they rejected; and we will therefore state our views with diffidence and without much detail.

The serious evil demanding a radical cure is the continuance of sub-infeudation; for, while it is permitted, pernicious results are inevitable. The difficulty of retaining it consistently with efficient reform, is proved by the machinery introduced into the amending statutes. In the general transference of lands acts there is a series of complicated sections and schedules governing the modes of entry; and like provisions are made in the service acts. Implied confirmation, and the purchase of casualties and feu duties would, doubtless, remove a portion of the existing evil; but much of it would remain untouched. As we read the suggestions, implied confirmation is not to exclude resort to the existing forms, but is to operate where they have not been used. The remedy, therefore, would be partial and precarious, as the observance of the existing forms might, from many

¹ Report of Law Com. on Conveyancing, pp. 54—58.

motives, be enforced; and the admixture of these with the new rules would, by complicating the system, add to the embarrassment and insecurity of land rights. The practical difficulty is shown by the safeguards proposed; —for example, a power to the superior to challenge the vassals sasine on any ground which would have been applicable to a charter of resignation, or, where the vassal has recorded a sasine inconsistent with the superior's right, to sue to have the title annulled and one taken conformable to his views. In like manner during the continuance of sub-infeudation, the power of purchase or commutation would be a partial and fluctuating remedy. The judicial procedure suggested is, perhaps, the best machinery which can be devised; but, like every improvement which can be operative only through such procedure, recourse would be had to it with reluctance, and superiors and vassals would often rather be content with their actual position. As each new subfeu involves casualties and feu duties, the remedy would become necessary in each instance; and there would be a series of alternate creations and extinctions perplexing in practice, and exhibiting a system both cumbrous and irregular.

We will now give an outline of a remedy which, without pretension to originality as to its component parts, has not, in so far as we can trace, been hitherto presented as a whole. Our propositions are, *First*. With relation to existing feus, all superiorities intermediate between the holder of the *dominium utile* and the Crown or at least the tenant *in capite* of the Crown, should be abrogated, which, *Secondly*, should be combined with the compulsory purchase and sale of casualties and feu duties or their conversion into an annual real burden. *Thirdly*, with relation to future land-rights, the feudal tenure should be the same as in the preceding case, united, *Fourthly*, with the power of creating annual real, but transferable, burdens; on which system, *Fifthly*, should be superinduced a system of leasing so regulated as that it might be engrafted on the radical titles. In the reform here indicated, we have purposely rejected the proposal to substitute allodial rights for feudal, because we doubt the compatibility of the allodial theory with strict principle, and because we think

that the same benefits can be attained without so great a deviation from existing law or so marked an encroachment on juridical opinion. The fundamental principle of feudalism, which vests the whole lands of the state in the sovereign, would remain intact, while, by the adoption of the modes of tenure suggested, sub-infeudation and its attendant evils would cease.

The proposition that all lands should be held directly of the Crown, has the important advantage of simplicity. It is not contemplated that there should be any thing analogous to the present system of Crown Charters. Under rights now existing intermediate superiorities should be abrogated and feu duties and casualties be valued and purchased. A deed embodying the abrogation and purchase, and declaring that the tenure was in blench of the Crown, might form the fundamental title, while a relative document, similar to the statutory sasine, might be put on record. Where, as in feus for building, there were conditions affecting the body of feuars, these could be rendered effective and permanent by inclusion in the newer title. This mode of tenure has the additional recommendation of its having, in some measure, an analogy with burgal holding, which, it has been conceded, constitutes a simple and efficient title, free from the defects and anomalies of feudality. And of this a strong proof is afforded by the comparatively small extent of reform which it has been found necessary to apply to Burgage tenure. But if this should be deemed too great an innovation, we would be content with the introduction of holdings of the tenants *in capite* of the Crown, with the abolition of sub-infeudation. This tenure, independently of its analogy to the English statute of *Quia Emptores*, has the sanction of high authority. A reference has been already made to a passage (which we now quote) in Lord Stair's Institute, recommending the abolition of sub-infeudation. "It might also be statuted with greater advantage to real rights that none should be capable to give subaltern infeftments but the immediate vassals of the King, and that the proprietors by other subaltern infeftments should all be ordained to take charters of the King's immediate vassals, from whom at first all subaltern infeftments behoved to

flow,—with this provision, that if the subaltern vassals were obliged any farther to their immediate superiors than they were to the first superior, as if they obtained a greater feu duty, or if a ward or blench vassal set the whole or a part of his fee in feu farm, the superior being the King's vassal or his successor, should give to that subaltern interposed superior an irredeemable annual rent equivalent to the excresce which he had from his vassal above what was due to the first superior.”¹

In future transfers of real property the disposition and the recorded sasine ought, by virtue of the statute, immediately to vest the disponent with the *status* of the vassal of the Crown or of the tenant *in capite* of the Crown, according as one or other of the modes of tenure should become law. If tenants *in capite* with the power of a single sub-infeudation were allowed to continue, their titles would, necessarily, be derived from the Crown by charters the same as are now in use, or with such farther abridgment as might be suitable to the amended system. Subordinate estates might, compatibly with either mode, be carved out by the reservation of a ground rent or analogous charge, which might be imposed as a real burden, be registered as such, and be transferred by assignment recorded. An annual payment thus created and regulated, styled a ground annual, is known to the law of Scotland; but, as in practice, it has been used chiefly in Burgage property, it has not attracted much of the attention of conveyancers. It might serve as a model, subject to the needful changes, for the description of estate here indicated.

On this system of feudal rights a system of leasehold could be advantageously engrafted. Leases, either for long terms of years or in perpetuity, might form the basis of the title of subordinate estates. The perpetual lease, or assedation, as it was styled, is strictly compatible with feudal tenures. According to the ancient law of Scotland, “if the subfeudation be a real feu farm, whereby the feu duty is considerable and competent to entertain the vassal, such feudation is thereby

¹ Stair's Institutions of the Law of Scotland, b. II., tit. 4., sec. 6. *Vide* also Ross's Lectures on the Practice of the Law of Scotland on Conveyancing, vol. ii., p. 301.

accounted only location.”¹ And in the statute by which barons and freeholders “may let their landes in few ferme,” the grant is termed an *assedation*.² Although grants in feu-farm have long been regarded in practice as strictly feudal, it is important that their earlier purport should be remembered, as it may render the extension of leasehold acceptable to those jurists who consider the sanction of antiquity as of value.

But utility is the object which demands attention, and the course suggested would, certainly, be useful. By a system of leasehold well-regulated, estates might be carved out entirely free from the complexity and subtlety which sub-infeudation involves. In reality it is under leases that a very large portion of valuable estate is held; for although the agricultural lease for nineteen or twenty years is comparatively short, yet the same principle operates in the creation of such a subordinate estate as in leases for long terms. Feus are now in demand chiefly for building; and for that purpose leases of long duration or in perpetuity might be substituted. A statutory system might be framed without serious difficulty. *First*, a record of leases and of the relative transferences, conditions, and burdens might be created, from which creation great advantages would accrue. Such a record has, at different times, been contemplated. It was proposed by the Law Commissioners, and a Bill for its establishment was brought in, but was afterwards abandoned. By such a record all the conditions of the original lease could be preserved; and, at every stage of transmission, the document could be consulted, deviations from it prevented or corrected, and protection given where the interests of third parties were involved. *Secondly*, unlimited powers of assigning should be an integral part of the system, combined with powers of subletting subject to limitation as to number in the descending series of sub-leases. Where ground, as in building leases, was let to numerous lessees, there should be inserted conditions protecting joint or general interests, which each lessee might enforce, or call on the lessor to enforce. *Thirdly*, the lessor's preference for rent by

¹ Stair, b. II., tit. ii., sec. 13.

² Stat. 1457, c. 71. Scotch Statutes are cited by the year of our Lord.

hypothec or distress against the possessor should be preserved, under such modifications as would render that right more in accordance with the welfare of the community, than it is under the existing law. And, *Fourthly*, power might be given to burden in security of debt, creditors being entitled to enforce their claims by attaining either natural or civil possession. As the law stands, no mode has, hitherto, been devised by which leasehold property can be subjected to security for debt; and this has been felt as a serious evil. The law of courtesy and terce might be rendered applicable, and powers be given to burden for provisions for wives or children. Although recourse to the conditions of the original title and their observance throughout would be the most simple and effective mode, yet the introduction of prescription might be attained. The right, as it existed for the preceding forty years, might be held to govern on the assumption that the lessor or other parties having an interest had guarded themselves against encroachment or deviation.

Alterations so extensive and varied on the contract of lease have, doubtless, an appearance of innovation which may be startling to the Scotch conveyancer and even to a portion of the community. But the power of the statute could remove the technical difficulties of the former, and the latter would soon perceive that the change was for their good. The most plausible objection which has been urged against the substitution of leasehold for the feudal tenure is,—that the people of Scotland have hitherto shown a preference for the latter. There is truth in the observation; but sufficient attention has not been paid to either the cause of the preference or to the important modifications to which it may be subjected. The preference is owing to that respect for feudalism which was so anxiously inculcated, and by which all classes were affected. A relation with a great proprietor in the capacity of vassal, and the power of himself becoming a superior, combined with the identification of the feudal right with perpetuity, gave, in popular estimation, the feuar a position preferable to that of the lessee. But these prejudices are fast yielding to the more enlightened and practical views which have resulted from commercial enterprise. The introduction

of building leases of long duration, and the consequent creation of valuable and permanent leasehold property, are rapidly tending to enhance tenure by lease in popular opinion. In increasing towns near entailed estates, leases for ninety-nine years, under the 10th of Geo. 3. c. 51., are in general demand, notwithstanding the stringent conditions which the statute imposes. In common parlance holders of long leases are often styled proprietors; and numerous attempts have been made, but hitherto without success, to devise means for making leasehold property available in security of debt. As these sounder views are now in progress, they would soon gain the ascendant if the proposed change were made.

Difficulties might, doubtless, be encountered in adjusting details. But, as experience has proved, these would be overcome if the principle were conceded, and an effort made to carry it into execution. The same prediction of evil, and the same disappointment of the prediction, attended important alterations which have from time to time been made in the law of Scotland. Evils of great magnitude were apprehended from the changes of the tenures and the abolition of the heritable jurisdictions, from the Sequestration Act, and from the recent amendments on the law of real property and on the law of entail.¹ But it has been found that the apprehensions were groundless, and that the law has been greatly improved.

¹ Here we must correct a mistake which, by unaccountable inadvertence was made in the Article on Scotch Entails in our number for November, 1848, pp. 61—62. It is there said, that the 5th Geo. 4. cap. 87. authorises the proprietors of entailed estates to grant provisions, first, to wives or husbands to the extent of one-third part of the free rent; and secondly, to younger children to the same amount; whereas the "secondly" should have been,—to the extent of three years' free rent.

ART. V. — THE REFORM OF THE INNS OF COURT.

No. I.

ON the 27th of February last, the Attorney-General, in answer to a question of Mr. Ewart, informed the House of Commons that the lectures established by the Inns of Court had not been successful, and that he had been informed that it was the intention of the Society of Lincoln's Inn to discontinue the appointment of the lecturer on Equity; which fact is placed beyond doubt by an inquiry which we have made in the proper quarter.

The Society of Lincoln's Inn appointed a lecturer¹ in Michaelmas Term, 1847. It would seem, therefore, that either the Society was wrong in taking this step, or in revoking it after so short a trial of lectures. To appoint a lecturer in November, 1847, and to discontinue the appointment in February, 1849, is surely, on the face of it, without explanation, a somewhat strange proceeding; more especially as the learned lecturer, we believe, did not commence his lectures until Michaelmas Term, 1848. It becomes, then, of some importance to inquire into the reasons and motives for the establishment of lectures, and whether those who had to watch its early existence have done their duty by it: whether, in fact, the bantling has been properly nursed and tended; whether it has had a fair and reasonable support from its foster fathers; whether they really wished it to live, or whether, though, like *Becky*, they might give it a kiss in public, they pinched and neglected it at home.²

¹ In this Society he is called Professor. There is no uniformity in this respect in the Inns of Court — not even in name.

² "Rebecca, seeing that tenderness was the fashion, called Rawdon to her one evening, and stooped down and kissed him in the presence of all the ladies. He looked her full in the face after the operation, trembling and turning very red, as his wont was when moved. 'You never kiss me at home, mamma,' he said: at which there was a general silence and consternation, and a by no means pleasant look in *Becky's* eyes." — *Vanity Fair*, chap. xlv.

We appeal to all our preceding papers on this subject, from the first proposition of a Law University¹, whether we have shown any want of respect to the rulers of the Inns of Court. We have all along admitted the importance of obtaining their concurrence, and support of any scheme of legal education; and we have laboured hard to secure their cordial co-operation. But we think we have a right to inquire freely into the manner in which they have executed the trust reposed in them; and if we shall now find it our duty to express ourselves strongly in the matter, we wish to be understood as imputing no blame to any individual. The *majority* are in fault. There is, we believe, even in Lincoln's Inn, a *minority* to whom no blame whatever can attach; and we know not in which class, majority or minority, any individual bencher should be ranged. Nay, we do not wish to inquire.

It is to the acts of the body that our observations are intended to apply. But need we go further than this? Need we say that we respect and honour the lights and ornaments of our profession; that we reverence the Bench; that we exult in the genius, the learning, the high and generous feeling of the leaders of the Bar; that we, however humble our own position, have enjoyed the courtesies, not to say the friendship, of some of them; and that at no period of our legal history was there ever assembled round the Bench table so illustrious a body, in station, in learning, in integrity of purpose, in blamelessness of life, as is now to be found there, if we look to its members as individuals? But it is on this very account that we do not hesitate to tell them that, as a body, they are wrong; that they are acting without a complete knowledge of the subject; and that the sooner they retrace their steps, or adopt some other mode of proceeding, the better.

The previous examination of this subject has now fortunately narrowed the ground for discussion. After the documentary and other evidence already produced, it will not be disputed that the Inns of Court were instituted for the purpose (among others) of affording a legal education; that lectures were at one time delivered in their halls; that examinations and mootings were once in force; that these were made

¹ 1 L. R. 345.

the bases of all degrees granted in law ; and that the Benchers of all the Inns of Court hold their lands in trust (among others) for these objects. We have never seen of late any of these propositions attempted to be denied. The arguments against the establishment of a complete system of legal education are now of a different kind. They are put forth very faintly ; indeed, they have been rather hinted at and whispered in private conversation, than publicly stated and avowed ; but, so far as we have been able to collect them, they are as follows : —

It is said that the science of the law cannot be properly taught, or even assisted by this mode of teaching ; that lectures may be useful in teaching chemistry or other sciences where experiments are introduced ; but that in a science so abstract as the law, it is impossible to learn it otherwise than by books and private study. As to which we have only to reply that for a long period, even in this country, the law was thus taught—in these very Inns of Court ; and that it must be shown, to give any value to this argument, that the students of the present day are of a different mould from those of a former time. But, passing this, we all know that various branches of the law have been taught in all ages by word of mouth ; that many of our best institutional works, both here and in America, have been first delivered in the form of lectures ; that at the present moment in all the principal Universities of Europe, and in Scotland, Professors of Law exist equally, and with as great benefit and success, as Professors of Divinity and Medicine ; and that wherever, in this country, the attendance on lectures on law has been rendered essential to obtaining a degree, or made a systematic portion of an academical course, it has been attended with success. Ask any attorney who has been admitted for the last ten years, or any person who has, for the same period, received legal preferment in India, whether he has derived no benefit from lectures on law ; and we apprehend he will be as much amazed at the question as if he were asked whether his breakfast or his dinner did not contribute to the nourishment of his body. To say that lectures, and nothing but lectures, would do, is not correct ; but to conclude from this

that lectures, accompanied by other studies, are of no use, appears to us, we must say, ridiculous.

But this, we think, is hardly said by any one, unless, indeed, by some very old gentlemen.¹ The way it is usually put is, that lectures are not suitable for the Bar; that there is something in the peculiar idiosyncrasy of this branch of the profession which disqualifies its members from deriving any benefit from this mode of instruction; that it may be useful for attorneys, but to the higher branches of the profession it can be of no value.

Now this we cannot understand. In what respect does one branch of the profession, so far as this matter is concerned, differ from the other. Are not the same impressions produced on the minds of the one class as of the other? Many families have very recently produced distinguished members of both branches of the profession. Two brothers start in life very much about the same age; one becomes a barrister, the other a solicitor. Numerous instances of this will occur to the mind of our readers. The families of Wilde, Shadwell, Pollock, Pemberton, Follett, Bethell, and others, will readily supply living illustrations of this; and yet can it be contended that if one brother enters an Inn of Court and the other becomes an articled clerk, that what is useful to the one is entirely useless to the other. What is the condition of the student of the Inns of Court? Let us see how Blackstone describes the student of his day; let us ask how he differs from the student of the present day:—"We may appeal," he says, "to the experience of every sensible lawyer whether any thing can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and inexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; *with no public direction in what course*

¹ We certainly did hear an old Master in Chancery, now no more, give utterance to something like this:—"For my part," said he, "I can't see any good in these lectures. I never got any good from them." This was, indeed, one of the best experimental arguments he could have used in their favour.

*to pursue his inquiries ; no private assistance to remove the distresses and difficulties which always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of indigested learning ; or else by an assiduous attendance on the Courts to pick up theory and practice together sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at that we hear of so frequent miscarriages ; that so many gentlemen of bright imaginations grow weary of so unpromising a search, and addict themselves wholly to amusements or other less innocent pursuits ; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives.”*¹

This appears to us a pretty accurate description of the student of the present day. It may be said that since the time of Blackstone the custom has grown up of resorting to a barrister's chambers as a pupil ; but without at all undervaluing the instruction here obtained (which we deem essential to the acquirement of a proper knowledge of our profession) it is sufficient to say that it cannot supply the want of systematic lectures and examination. The understanding has ever been, that all that the barrister undertakes is to allow the pupil to see the business that passes through his chambers ; any thing more than this is entirely voluntary, and more than this a barrister or pleader in full practice cannot bestow. No regular instruction in the law is attempted in the chambers most frequented, and when it is, it merely proves that a knowledge of the law can be thus communicated.

These appear to be the obvious truths connected with this subject. What, then, is the great argument against the establishment of lectures ? The Attorney-General has stated it in his answer to Mr. Ewart. That it has been tried by three of the Inns of Court and that it has failed ; as to the fourth, in which it is admitted to have had more success, we shall have a word to say.

¹ 1 Com. 31.

Let us inquire, then, with what accompaniments it was understood that lectures should be instituted, and how far these further proceedings were recognised by the Inns of Court. We think it will be easy to show that no person who promoted or advised the establishment of these lectures, ever intended that lectures only should be delivered. It is to be remembered that certain steps as to legal education were taken in the first instance by the Inns of Court without any recommendation from Parliament; and, in the next place, certain other steps, as was stated by the Attorney General, in pursuance of the recommendations of the Select Committee, thus so far connecting the proceedings of the Inns of Court with those of the House of Commons' Committee. As we have taken great interest in the question from its commencement, we have endeavoured to preserve most of the documents connected with it, so that our readers may easily satisfy themselves on this point.

The first of these proceedings (we mean, of course, of late years) is the Report of the Committee of the Middle Temple in November, 1845.¹ In this document, the first recommendation is the appointment of a lecturer; the second is "the institution of an annual examination of students proposed for the Bar previous to their being called." This proposed examination was not to be compulsory; but "the names of those students who have submitted themselves to examination were to be published by the Society, with such honourable additions as they shall appear to have deserved; and the Committee hope and believe that the attention of the profession will be attracted to these lists, and that many young men will be found desirous of availing themselves of this unexceptionable mode of becoming known and distinguished. The Committee propose that the examination shall be conducted by three benchers, assisted by the lecturer."

The Report goes on thus:—"The third recommendation of the Committee is necessary *for the completeness of the institution they desire to see established*. As an additional inducement to attendance at the lectures and to exertion at the

¹ Printed *antè*, 3 L. R. pp. 406—412.

examination, the Committee propose that two exhibitions or prizes, of one hundred guineas each, should be given by the Society to the two students who, having diligently attended at least three terminal courses of lectures, shall have passed the most meritorious examination. The Committee believe that these exhibitions will not only prove to be a great incentive to attendance at the lectures and at the examinations, but that they will also be found of great benefit to many young men of slender means; *and the Committee trust that the number of the rewards may be hereafter augmented.*"

"At a Parliament holden this sixth day of January, 1846, *'It is ordered that a lecturer be appointed, an examination instituted, and two exhibitions established, in the manner and subject to the regulations recommended in the Report.'*"

In pursuance of this Report, Mr. George Long was appointed Reader in Jurisprudence and Civil Law.

Committees having been appointed by the several Inns of Court to consider and report on this subject, "Minutes of the result of the conferences of the deputation from the Committees of each of the Inns of Court on the subject of Legal Education, as approved June 3. 1846,"¹ were drawn up at the Inner Temple.

The deputation agreed that the following propositions should be offered for adoption to their respective Societies:—

"That it is expedient to institute rewards or honours, or both, by way of encouragement to students who may be willing to undergo examinations.

"*That for the purpose of preparing the students for such examinations*, there should be established four lectureships, in addition to that on Civil Law and General Jurisprudence already established by the Middle Temple.

"That the subjects of the additional lectures should be:—

"1. Constitutional Law, Criminal, and other Crown Law.

"2. The Law of Real Property, and Conveyancing, Devises and Bequests.

"3. Those branches of the Common Law which are not included in the two last heads.

¹ Printed, 4 L. R. p. 44. Also printed in Report of Select Committee of House of Commons, App. p. 340.

“4. Equitable Jurisprudence, as administered in the Court of Chancery.

“ That the lectureship for Constitutional Law, Criminal, and other Crown Law, should be maintained at the joint expense of the four Societies.

“ That the lectureship for Civil Law and General Jurisprudence should be maintained, as now, at the sole expense of the Middle Temple.

“ And that the other three lectureships should be maintained at the expense of the three other Societies respectively,—one for each,—as shall be hereafter arranged among themselves.

“ That no examination should be required of any student as a condition precedent of his call to the Bar.

“ That every student should be required, as a condition precedent of his call to the Bar, to produce a certificate of his having attended two of the courses of lectures, the selection to be determined by himself.”

It will be observed, that although no compulsory examination was established, yet the step of appointing lecturers was recommended to be taken for the purpose of preparing the student for a voluntary examination.

In pursuance of these suggestions, the three other Inns of Court selected and arranged their respective departments of lectures. To Lincoln's Inn Equity was assigned; to the Inner Temple, Common Law; and to Gray's Inn, Real Property and Conveyancing. Of these, the Society of Gray's Inn was the first to take any step in acting on the suggestions; and in Michaelmas Term, 1846, a “lectureship of Real Property and Conveyancing, Devises and Bequests,” was established, and subsequently in Easter Term, 1847, Mr. W. D. Lewis was appointed the lecturer. Shortly afterwards, the Inner Temple appointed Mr. R. Hall lecturer on Common Law; and Lincoln's Inn, on the 20th July following, issued a notice¹ that the benchers would appoint a lecturer on Equity in the succeeding Michaelmas Term; and in that term Mr. Spence was accordingly elected by the majority of the benchers, Professor of Equity.

¹ Printed, 6 L. R. p. 446.

The appointment of Mr. Spence by the Society of Lincoln's Inn was accompanied by the following recognition of the "minutes" made at the Inner Temple in June 3. 1846:—

"Resolved, That students of the Inns having attained the age of twenty-three years, may be called to the Bar after the expiration of five years from admission, twelve terms having been kept, nine exercises performed, and certificate produced of attendance on two courses of lectures. Masters of Arts and Bachelors of Laws of the University of Oxford, Cambridge, or Dublin; and students of the Inn, not being graduates, but who, on their application, are examined in law, and pass a sufficient examination, having complied with the requisition in respect of terms, exercise, and certificates, may be called after the expiration of three years." (June 11. 1847.)

So far at present as to the Inns of Court. Let us now turn to the Report of the Select Committee on Legal Education and its recommendations, which, according to the Attorney General, were attended to by three of the Inns of Court. It will be found that they all point, not only to lectures, but to examinations, to attendance on lectures as necessary to a call to the Bar, and to the other means of instruction to which we have alluded.¹ In this they only echo the recommendations of the long list of persons, some of them of eminence, examined by them. It will be found that with them examinations were considered more important even than lectures.² They further state their opinion that it would be competent for the Inns of Court to insist on such examination. Among others thus given, we would cite that of Lord Campbell, which is strongly in favour of examinations, and he concludes by saying, "I think it should be left in the first instance to the Benchers of the Inns of Court to introduce the necessary reforms; but if they should fail in doing so, *I think it would be a very good subject to be taken up by the legislature.*"

It will be remembered that the Report of the Committee

Printed, 6 L. R. pp. 240—242.

See these opinions collected 7 L. R. pp. 94—113. In collecting them (Nov. 1847) we find that we observed, "After the first novelty has passed away, lectures, if unaccompanied by other changes, will cease to be attended." 7 L. R. p. 83.

(which took a good deal of evidence on the subject) pointed to a Royal Commission which was to regulate the whole subject of legal education.

Thus, and under such auspices, were these lectureships established, and we had the pleasure of giving, from time to time, an account of their progress, and of endeavouring, so far as was possible, to assist their practical operation. It is to be observed that the scheme agreed to by the delegates was not completed, because the fifth lectureship contemplated by it has never yet been established; but the four lecturers were proceeding with their courses, the halls and libraries began to have the appearance of legal universities, notices being given of the different classes; and it was only in August last that we directed attention to the subject, and printed (8 *L. R.* p. 384.) the written statement, of all the lecturers, "that the system and practice of English law, concurrently with general jurisprudence, may, with advantage to all students for the Bar, form the subjects of public lectures regularly attended by them," and "respectfully representing to the Benchers of the four Honourable Societies, *that attendance, to some reasonable extent*, upon the law lectures which are now being delivered in the halls of the several Inns of Court, under their sanction, might become usefully, for the future, part of the qualification to be required in candidates for the degree of barrister." They further "expressed their opinion that the efficiency of the professorships which had been recently instituted was not adequately secured without the public sanction of the Benchers of the Inns of Court to some system of voluntary examination, by means of which successful application to the studies which may properly be required in students for the Bar may be duly recognised, and the competition of the students in such exercises encouraged." (Trinity Term, 1848.)

This, surely, was a reasonable and moderate request on the part of the lecturers, and we had reason to suppose that it would meet with due attention from the rulers of the different Societies. Instead of this, the Benchers of the leading Society, Lincoln's Inn, before the expiration of six months, caused the following notice to be placed in the dining hall:—

"Lincoln's Inn, Jan. 9. 1849.

"Resolved, That it be not deemed compulsory on the students of this Society to attend the lectures delivered by any of the professors."

This obviously was intended as a warning to the students that lectures were at an end.

So far from granting the reasonable request of the lecturer whom they had appointed, they thus practically shut up his lecture-room; and it was only to be expected that shortly afterwards the Benchers gave the lecturer something like a notice that his appointment would not be continued beyond one year more; and on the 14th of February, 1849, they revoked the order of 1847, printed *antè*, p. 100.¹

Without wishing to go one step beyond the facts, we do not hesitate to say, therefore, that the Society of Lincoln's Inn has not fulfilled the promises to which it was a party by its delegates at the Inner Temple in 1846, although these were recognised and partly performed by the general body.

Surely it cannot properly be said, after a perusal of the documents to which we have alluded, that the mere appointment of a lecturer was a sufficient discharge either of the original trust, or of the agreement to which it had come, in common with the other Inns of Court, even if they had continued the appointment. Surely it must be admitted by all impartial persons that one year's trial was not a sufficient one in this instance. Put this analogy. Suppose one of the Universities were to content themselves with founding lectureships for a period, and give degrees without examinations or certificates of attendance. At the end of a year it is found that no one attends; upon which the Fellows of the Colleges say, "We have done all that can be expected of us." Then what is the good of Colleges, and what were these Societies founded for?

We have no doubt that a diligent student may, and that many do, prepare themselves well for the practice of the law on the present plan; — that is, by private reading, attending chambers, and so forth, for all which they want nothing and receive

¹ This step was a little premature, for we understand that, at all events, one application has been made to be examined under the *revoked order*!

nothing from the Inns of Court. If these Inns did not exist, a man could prepare himself just as he does now, and begin to practise when he chose. The Inns have nothing to do at all. They do not even secure in those who are called to the Bar any knowledge of any kind. Nor do they secure the exclusion of improper persons. The Inns of Court are, in fact, fast becoming the refuge of the destitute, and the profession of a barrister is now taken up when other callings have failed, and sometimes when persons have not only failed, but failed discreditably. London, in fact, swarms with these titular barristers; and we do not hesitate to say that it is becoming far less honourable and difficult, so far as character and learning are concerned, to become a barrister than an attorney. This may be an unpalatable truth for a barrister, far more a benchers, to admit, but the slightest investigation will establish its truth. There is no proper attention by the Inns even to discipline. For what good purpose, then, should the Inns of Court continue to exist any longer? They do nothing for the industrious who qualify themselves for their profession unaided by the Inns; but they do something for those who do not qualify themselves: they give them the same rank and title, the same capacity to fill lucrative offices, which they confer on those who possess competent legal knowledge.

With what justice, then, has the experiment of lecturers been so prematurely abandoned. Several of the former classes began with a good attendance. The Attorney General said that in the Civil Law Class there was only one pupil. This doubtless he believed to be true; but at first there were more than a hundred and fifty, and a regular attendance of eighty. These students entered the class on the understanding that the Benchers would keep the promise made by them on its establishment, of instituting examinations and giving exhibitions and prizes. There were at first, as we believe, plenty of students ready and willing to be examined and to contend for the prizes; but finding their just expectations in these matters entirely disappointed, and that barristers were called without examination, was it surprising that their zeal declined and that the class dwindled away to nothing? What we complain of is, that not only was no encouragement given to

attend to these lectures, but that their attendance was discouraged. The mere appointment and payment of the lecturer was a mockery, unless he was supported. Who supposes that medical students would attend lectures if attendance was not made compulsory, and necessary to obtain a degree. We need not say what would happen if the Council of the College of Surgeons was to issue a notice that attendance on the lectures was not required. But, fortunately for our argument, all of the Inns of Court have not thus, to use Lord Castlereagh's forcible metaphor, "turned their backs on themselves."

In one Society, Gray's Inn, the Attorney-General admitted that the lectures had succeeded, but he ascribed this to the nature of the subject of the lectures—Real Property and Conveyancing. We admit that these are good subjects for lectures; but surely this is not the only reason. We can give the Attorney General another. In Gray's Inn the Benchers have acted according both to the spirit and the letter of the minutes made at the Inner Temple. They have supported the lecturer in every way in their power. Examinations have been instituted, and the Benchers have themselves assisted the lecturer in them. We have already taken an opportunity of stating our opinion as to the great merit of that learned gentleman, but we think also that much honour and praise are due to the Benchers for their steady support not only of the lecturer, but of the cause committed to them.¹ All must unite; the societies must encourage the attendance of students, not practically forbid them. No doubt, the conduct pursued by the other Inns of Court has had its effect in dissuading students from attending him, but Mr. Lewis, with the assistance of the Gray's Inn Benchers, has established the fact that a fair working class can be formed; and we have no doubt of its permanent success and extended influence, so long as Mr. Lewis continues the lectures, and is as well supported by the Benchers as he has been. Nor do we doubt that the students themselves will soon make known their feelings in favour of legal education; or that, if the Benchers do not supply it, other means will be found for making some provision. That there are the materials in London for an excellent class in all the great departments of the law, we do not doubt, and this

¹ See as to this 8 L. R. p. 384., and 9 L. R. p. 221.

among the students for the Bar ; but we have always expressed our opinion that it should not be confined to them. As some evidence of the desire of the large body of law students belonging to the other branch of the profession, we may refer to their memorial to the Lord Chancellor and Master of the Rolls.¹ “ We humbly think,” they say —

“ That nothing will tend so much to secure the honour, respectability, and efficiency of our profession, as carefully watching the education of its rising members. It was to promote this that the examination preparatory to the admission of attorneys and solicitors was established, — a measure which, in our humble opinion, has already been of great advantage, and which bids fair for much greater hereafter. Your Lordships’ attention may not have been called to the fact, that there is no institution existing, either in the metropolis or elsewhere, receiving the general support of the profession, calculated to assist the articled clerk in his studies, or to aid him in his preparation for the examination ; and that, consequently, the clerk, at the commencement of his articles (for want of that advice and assistance which such an institution might afford), has to struggle with so many difficulties that he too frequently abandons himself to despair of ever acquiring a sound and comprehensive knowledge of his profession, and aims solely at getting up sufficient knowledge to enable him to pass — knowledge acquired merely for the occasion, and which, not being engrafted firmly in his mind, and made, as it were, a part of himself, is more speedily lost than attained ; or, as is frequently the case, he fails — not owing so much to his want of inclination or ability, as of that assistance and stimulus which the generality of youth so much require. We would also request your Lordships’ attention to the fact, that although amongst articled clerks are to be found youths at least equal in ability to those of any other profession, and although their number is so great, yet few ever attain to eminence or distinction in their profession, caused, as we would humbly submit to your Lordships, by the absence of an institution such as we now propose. Another consequence is, that the profession and the public are much exposed to the malpractices of artful and designing men, who, having but a superficial acquaintance with the law, make it an instrument of oppression. Thus the public are injured, and the profession disgraced. The remedy, we humbly suggest, is to be found in the establishment of an institution which will raise the qualified practitioners above the attacks of these individuals, and draw so wide a line of demarca-

tion in respect to character and competency between the two classes, that none, in entrusting the care of their fortunes and interests, need ever err.

"We have viewed with great interest the late proceedings of the Benchers of the Middle Temple, on behalf of candidates for the Bar; and we humbly think that the time is now arrived when the articulated clerks should put forth their claims to the consideration and assistance of the attorneys, and other members of the legal profession, upon the subject of education. The present appears, for this reason, to be a very happy crisis; and if we delay urging this subject now, we shall suffer such an opportunity to pass unimproved as may not occur again for many years.

"The character of the Society will not, of course, be collegiate, but institutional. It is intended to be a valuable auxiliary to the office or chambers; and whilst at the institution the theory and principles of the law are principally learned, the practice at the office or chambers will be rendered more interesting and instructive. It is hoped that theory and practice will be thus happily combined; and that whilst the institution may be as a study, the practice at the office may bear the same relation to the lawyer as the experiments of the laboratory to the chemist."

This document shows to some extent the feeling which exists in favour of some systematic course of legal education. But besides the students belonging to both branches of the profession, there are, if we are not mistaken, many other persons not only connected with the legal profession, but entirely unconnected with it, to whom the establishment of a law school would be highly desirable, and to whom the course pursued by the majority of the Inns of Court will be a great disappointment, because, far from any discontinuance of the lectures being imagined, their extension to all the world was hoped for and expected. As it is, the Inns of Court as a body abandon the field. And perhaps it is the fact, that they cannot act as a body, which lies at the root of the evil. Much as we are disposed to blame the Benchers for some part of their conduct in the matter, we admit that they have this excuse. As there is no uniformity of proceeding in the Inns of Court, and apparently no mode of securing it, it is impossible for one Inn of Court to act effectually or completely; for say that any one of the four lay down a rule that no student shall be called to the Bar without a previous examination, another Inn may say that it will make no such alteration, and thus

the Inn which wishes to do right may be prejudiced and the cause be only slightly served. The remedy for this is obviously for all the Inns of Court to take the steps required for securing the necessary uniformity. If the Judges, as visitors, have no such powers, they might perhaps be armed with them; but if any such attempt were seriously made, we apprehend it would only lead to one result, that of forming the Inns of Court into a law university.¹

ART. VI.—REPORTS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

COMMITTEE ON EQUITY.

THE following reference was made to this Committee : —

“ That this Committee be requested to direct their valuable labours to the consideration of the question whether any further alterations can be made in the whole system of the Jurisdiction, Practice, and Constitution of the Masters and Masters’ Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery.”

FOURTH REPORT.

In presenting their present Report, this Committee beg to refer to the Reports previously presented by them with respect to the Masters’ Offices, for an explanation of the sort of change which they consider to be required in that important department of our judicial system, and for a justification of the views adopted by them. It may be sufficient now to state that in those Reports they have recommended — 1st. That the Master be raised, from his present anomalous character of a judge whose decisions have only the authority of reports, into that of a judge by whom certain causes, or parts of causes, shall be heard and disposed of, subject to appeal; 2dly, that the present tedious and costly mode of hearing matters piecemeal, for one or two hours at a time, with an indefinite interval between the hearings, and the habitual practice of hearing matters in private, should be

¹ See note (B), *post*.

abolished, and that, according to the analogy of all our other courts, each matter, when ripe for discussion, be proceeded with continuously until it is disposed of, and the hearings be public, except in cases where the judge may consider a private hearing more advantageous.

Your Committee do not see any reason for departing from the recommendations thus made. Assuming them, therefore, as the basis on which to proceed, they have endeavoured to reduce the changes recommended by them into a definite and practical shape, by embodying them in a number of proposed orders, classified under several heads, which they hope may not prove useless, as suggestions, when the time arrives, as they believe it shortly will, for a complete change in the present system of proceeding before the Masters.

The length to which a detailed plan of this nature necessarily extends, must preclude more than a short notice of the proposed scheme in the present report. A concise statement of the object and mutual relation of its several parts may, however, it is hoped, prove not devoid of interest and utility.

A complete abstract of the orders suggested, will be found as an appendix to the report, from which a more accurate judgment of them may be formed.

The main object of the proposed plan is, as may be gathered from what has been stated, to confer upon the Master the authority of a Judge. For this, ample provision is made. Under the orders suggested, the Master would have all the powers now possessed by the superior Judges of the Court,—for disposing of all matters brought before him,—for binding those who are not parties to proceedings before him, but may claim an interest in their subject matter, by requiring them to come in and prove their claims,—and for dealing with the costs of all proceedings in his Court. It is proposed that he shall still act as an auxiliary to the Higher Courts, by entertaining inquiries or other questions preliminary to the hearing of a cause; but even in this case he would pronounce a decision or declaration by virtue of his own authority, and not make a report as the delegate of another tribunal.

But although the Master would thus exercise an independent jurisdiction in all matters brought before him, it is not proposed that causes should originate in his Court, at

least at present. Your Committee are indeed most anxious that every facility should be afforded for sending to the Master, with the least possible delay and expense, those numerous cases in which, under the present system, expensive proceedings must in the first instance be taken in Court, though the real questions in the cause are raised only when it comes into the Masters' Office: and it is not impossible that, if the experiment of giving to the Masters the authority proposed should be successfully tried, experience might suggest some classification of cases, into those where the cause must originate in the Superior Courts, and those where it might be allowed to originate before the Master. But in the absence of this experience, your Committee think it the wisest course to leave the cases to define themselves, by allowing the plaintiff in all cases to elect to sue before the Master, but obliging him, as the first step in that suit, to file a written statement of his case in the Superior Courts; so that the defendant may have the opportunity of raising any general objections to its nature or constitution, by demurrer or plea; or of urging that it ought to be heard by the Superior Courts. And they believe that this suggestion will materially diminish the difficulties which otherwise would attend the introduction of the proposed system.

Your Committee therefore propose, that in all cases, excepting those where, under any special order of the Courts or act of Parliament, application is allowed to be made to the Master independently, as on applications for time to answer, &c., it shall be necessary, for the purpose of getting before the Master, to procure an order referring the cause to him. These orders would be of two kinds: *special*, under which the Master would decide only upon some particular point referred to him; and *general*, under which he would have to decide, in the first instance, all questions in the cause or petition referred to him pending at the time of the reference, and would have jurisdiction to decide any question arising therein subsequently, although such questions would be also capable of being brought in the first instance before the Superior Courts.

References made before the hearing, in causes intended to be heard by the Superior Courts would be special; but it is

proposed that all references made at or after the hearing of a cause should be general, as would be also the references of those causes which the parties desired to have heard before the Master.

The mode of proceeding suggested in the latter class of causes would be as follows:— A person desirous of having his cause heard before the Master would file a petition, in the usual way, but marked for hearing before the Master, and containing at the foot of it a list of the persons intended to be made defendants to it. To prevent any burdensome expense to the petitioner in the beginning of his suit, service of the prayer of the petition, and the names of the parties, petitioners and defendants only, would be required as a preliminary to the process for compelling appearance. It would be open to any defendant either, 1st, to consent to an immediate reference of the petition to the Master, which would then be made as of course; or, 2dly, to demur or plead to the petition as if it had been a bill; or, 3dly, to insist that it be turned into a bill and heard by the Superior Judges of the Court, under the penalty, however, in the last case, of paying the costs occasioned by his demand, unless the Court should direct otherwise.

Thus, by a process of the simplest character, parties would be enabled to bring their causes before the Master, while facility would be afforded for disposing in the first instance of those questions which might affect the validity of all the subsequent proceedings.

As a further security against any difficulty arising from such questions, it is proposed that the Master shall have the power, in any cause or other proceeding heard before him, of reserving any question for decision by the Superior Courts, before which it may be brought by motion.

For those changes which may arise in the course of a suit before the Master by the births, deaths, marriages, bankruptcy, or insolvency of any of the defendants, it is proposed to make provision by allowing the Master, on the application of the plaintiff, to issue a warrant against the persons who are stated to be the necessary parties, requiring them to show cause why the suit should not be revived against or extended

to them; the order to revive or carry on the suit against them following, of course, if no satisfactory cause be shown.

The death, bankruptcy, or insolvency of a plaintiff would be provided for by proceedings analogous to that now in use in similar cases.

It is proposed that supplemental matter be introduced by amendment at any time before the hearing, and after it by carrying in a statement of it before the Master, without any preliminary proceeding in the Superior Courts.

Having thus brought the parties before the Master, the next subject is the mode of proceeding when they are before him.

Your Committee have already stated their unchanged convictions of the desirableness, as a general rule, of public sittings, and of continuous proceedings with a cause list: and the proposed orders will be found to provide accordingly that this shall be the rule where no special direction is given. But they consider it the wisest course to leave the power of regulating these matters to the discretion of the Judge, unfettered by any minute directions, according to the analogy of other Courts; and therefore do not propose any regulations beyond the general ones already mentioned.

On another point, however, which appears indispensable to the attainment of this continuity of proceeding, the proposed orders will be found to contain numerous rules; namely, respecting the preliminary proceedings or "pleadings in the Master's Office." For the bearing of this subject upon the continuity of proceeding, and the mischievous effects of the present practice, this Committee would cite the valuable authority of Master Farrer, who, in his recently published "*Observations on the Offices of the Masters in Chancery*," speaks¹ of "reform of the loose manner of pleading and giving evidence, as lying at the root of any real improvement in the Master's Office," and expresses an opinion that, without it, "continuous proceedings are impracticable." "If," he adds, "the Master is to act quasi a Common Law Judge and jury, the proceeding ought to be made by the orders of the Court, to resemble the forms of proceeding in the Courts of

¹ P. 17.

Law as much as is practicable." Nothing, indeed, can be further from the strictness of such modes of proceeding than the system at present in use. In indulgence to the suitor it is unlimited. No fixed time is appointed by the general rules of practice for any proceeding. There is no limit to the power of amending, or supplying the defects of states of fact, charges and countercharges. The same laxity extends to the reception of evidence. "There are," says Master Farrer, "in some cases, intervals of weeks, and even months, between the leaving of affidavits or the examination of witnesses, instead of (as in the Courts of Law) the whole evidence being taken at once."¹ Nay, evidence may be adduced, and even new states of fact carried in, *as a matter of right*, by the plaintiff or defendant, in answer to the reasons given by the Master for his decision, after argument upon the case as originally made; and although the Master may, and sometimes does, refuse to grant warrants for the purpose of reviewing his decision, he cannot prevent the whole case, thus made, being again brought forward in support of objections to the Report; a right which, as Master Farrer remarks, makes *ex parte* proceedings upon default of appearance, nugatory.

To meet this great evil, it is proposed to introduce into the Masters' Courts a system analogous to that of all our other English courts: *i. e.* to prescribe the order of the proceedings, to define the time within which each proceeding is to be taken, and to subject a defaulting party to the risk of an adverse *ex parte* decision, or to the payment of the costs occasioned by his neglect, as the condition of being allowed to reopen it. Thus it will be found that in every successive stage of each form of proceeding before the Master, the proposed orders fix a time within which the step then pending must be taken by the party whose turn it is to proceed, or the adverse party will become entitled either to get rid of the suit, if it has not been brought to a hearing; or, if that stage is passed, and the suit cannot be got rid of, to procure a decision upon the particular point in litigation, which shall be binding upon the defaulting party, subject only to appeal upon the facts of the

¹ Observations, pp. 43. 72.

case as they were before the Master; and to the right of the Master, if he thinks fit, to rehear the point decided.

Your Committee have not thought it advisable to enter into the details of the regulations thus proposed, which can be easily gathered from the summary of the proposed orders, appended to the Report. They wish, however, to remark, that the particular times selected are not, in their opinion, essential features of the plan. Other periods, longer or shorter, might be adopted, as should be judged expedient, without interfering with its principle, which is only that there shall be some fixed time for each proceeding, a disregard to which shall draw after it grave liabilities.

They may, however, observe generally, that for the purpose of facilitating the introduction of this regular course of practice, it is proposed that the pleadings before the Master shall be confined to one statement on each side. In causes heard before the Master, these statements would be the original petition, and what in the proposed order is called the statement of defence. In questions litigated before the Master after a decree, or upon a special reference, these statements would be called respectively charges and countercharges; any pleading previously used, either before the Master or the Superior Court, being, however, admissible, either wholly or in part, as a charge or counter-charge.

Provision is, of course, requisite for the amendment of these pleadings; but your Committee are of opinion that this privilege should be restricted within reasonable limits. Those limits they propose to fix by analogy to the rules adopted at present in proceedings before the Superior Courts; that is, they would allow a limited right to amend as of course, with an unlimited power in the Master to permit amendments at any time before the proceeding is at issue, on his being satisfied of the materiality of the amendments, and at any time after it is at issue, and before it is heard, on his being also satisfied that due diligence has been used.

Though convinced of the necessity of thus fixing the times for proceeding before the Master, your Committee, however, propose that he shall have an unlimited power of extending the time for any proceeding before him. They believe that

the pressure of rules of practice, when once established and enforced, as they would often be, by the penalty of costs, will be found sufficient to prevent undue delay; and that the absence of a power of relaxation would not be conducive to the interests of the suitors,

The proposed orders will be found also to contain some other suggestions, of which the main object is to leave the Master himself at liberty, if he chooses, to proceed without being too strictly tied to form. Thus your Committee propose that the Master may, if several questions arise upon any pleading before him, allow the other pleadings to be so framed as to permit of each point being separately raised, so that it may be disposed of separately; and may determine points of law raised on any pleadings, on the assumption of the truth of the facts stated in them, by a process analogous to a demurrer; and may receive affidavits in evidence, notwithstanding the party making them has previously been examined *vid voce*, or on interrogatories.

The important power which the Masters now exercise, of examining parties *vid voce*, or upon interrogatories, should, they think, be applied to all parties coming or brought before them.

Such are the main outlines of the proposed system of proceeding before the Master. There remain for notice the provisions suggested with respect to the decrees and orders of the Masters, and the mode of appealing from them. When the mass of papers liable to accumulate during a long investigation before the Master is considered, it appears to your Committee desirable that the formal declaration of the result of the investigation should contain an authentic statement of the facts on which the decision is founded. This statement is supplied at present by the Masters' "Reports;" and it is proposed to preserve it in these orders and decrees. It is, therefore, suggested that these shall refer to the evidence adduced, and state the facts proved, as the Reports now do; and that upon an appeal, the statements thus contained shall be taken as true, except when specifically objected to. To prevent the improper rejection of evidence, it is further proposed that, if the Master rejects any evidence, or refuses to

make any inquiry, this fact shall be also stated on the decree, and be a ground of appeal; and that the Master's decrees or orders may, upon an appeal, be referred back to him, with a direction to receive the evidence or make the inquiry, and reconsider his decree:—a course analogous to the granting a new trial for rejection of evidence, but which is not to preclude the judge to whom the appeal is made from himself deciding the question on the evidence as tendered. Evidence not tendered before the Master, it is proposed to exclude on appeal.

All the important features of the proposed plan have now been noticed, with the exception of one which did not come under the previous heads, and which is adopted from the resolution contained in the first report of this Committee. This is the proposal that the Master be empowered, in administration suits, to appoint, with the consent of creditors or legatees, some person to act for them, or any number of them. The remaining resolutions of the Report referred to are substantially embodied in the proposed orders.

The suggestions of which the above sketch has been given are classified under the following heads:—

1. Of the general powers of the Master.
2. Of proceedings before the Master generally.
3. Of the mode of proceeding on petition before the Master.
4. Of the mode of proceeding on a charge before the Master.
5. Of the amendment of pleadings before the Master.
6. Of the form of pleadings before the Master.
7. Of proceedings in the nature of supplement and revivor before the Master.
8. Of the mode of bringing proceedings to an issue before the Master.
9. Of the computation of time in proceedings before the Master.
10. Of proceedings on default before the Master.
11. Of the decrees and orders of the Master, and of appeals therefrom.

In conclusion, this Committee would notice with satisfaction the sanction given to the principle of the plans advocated by them as the true means of reforming the Master's Offices, by the act of last session, intituled "An Act to facilitate the winding up the affairs of joint stock companies and other partnerships." All the powers with which they have contended that the Masters ought to be clothed for administering, with advantage to the suitor, the ordinary business of the Court, have been conferred upon them by the legislature, for the one important purpose indicated by the title of the act. It will be difficult to show why, if the Masters can act with advantage as judges in the matters of such magnitude as are committed to them by the act, they cannot be trusted to be more than reporters in other matters, where the property concerned is generally much smaller, and the interests involved less complicated. On the other important point, the reform of the mode of proceeding in the office, the act is silent, though it tacitly admits the imperfection of the present system, by setting the Masters free from its trammels. But this Committee cannot but consider it a great step that the Master is raised by the act into a judge, and look upon this 'instalment' of reform with hope, as an earnest of the speedy approach of the time when the powerlessness of the Masters and the delays of their offices shall cease to be a reproach to our judicial system.

ABSTRACT OF THE PROPOSED ORDERS FOR AMENDING
THE PRACTICE BEFORE THE MASTER.

I. As to the General Powers of the Masters.

1. The Masters to have full powers to decide, as Judges of the Court of Chancery, all matters brought before them, subject to appeal to the Lord Chancellor, Vice-Chancellors, or Master of the Rolls.
2. The Masters to sit in open Court (with power to sit in private), and have cause lists of all, except summary pro-

ceedings; and to hear matters continuously, except when they shall direct otherwise; no notice required of the time when proceedings set down in the paper will be heard.

3. Matters in which original jurisdiction is not expressly given to the Master are to be brought before him under orders of reference, which are to be either special or general.

4. Under a special order, the Master is to decide only the matter referred, and questions incidental to it.

5. Under a general order the Master is to decide, in the first instance, all questions then pending in the cause referred; and to have power to decide all questions to arise subsequently. But such questions may be brought first before the Court to which the cause is attached.

6. All orders of reference at or after the hearing to be general.

7. The Masters to make decrees and orders and give certificates, not to make reports; and their certificates not to be subject to be sent back for review, unless in the case provided by art. 4. s. xi.

8. The Master may fix a time for persons, not parties to a cause before him, to come in and prove their claims.

9. The Master may appoint a person to act for creditors or legatees, or any of them, with their assent, and with or without a salary.

10. The assent not to be revocable without the Master's sanction.

11. All who have assented to be bound by all acts of the person so appointed, and to be liable to pay their proportion of the salary (if any), and of any costs incurred until the appointment is revoked.

12. The Master has full power to enlarge the time for taking any proceeding before him.

13. The Master may by his decree, on the application of any of the parties, reserve any question of law or practice for the decision of the Superior Judges.

14. Such questions may be brought on on motion.

15. The Master may determine questions of law arising on any pleading before him on the assumption of the truth of the facts stated, without proof of them.

16. And such questions may be brought, on motion, before the Superior Courts.

17. The Master may allow any one or more of different questions arising on the same pleading, to be brought on and disposed of separately.

18. The costs of all proceedings before the Master shall be in his discretion.

II. As to Proceedings before the Master generally.

The proceedings before the Master must be founded upon either, 1. a petition; 2. a statement of defence; 3. a charge; 4. a countercharge.

III. As to Proceedings before the Master on Petition.

1. Any person may file a petition, marked for hearing before the Master, and containing a list of the defendants.

2. Service of the prayer of the petition, and names of the petitioners and defendants, sufficient.

3. Such a petition may be pleaded or demurred to as if it had been a bill.

4. A defendant to such a petition may file a consent to its being heard before the Master.

5. A time fixed within which the petitioner must obtain an order referring the petition to the Master.

6. The order to be of course, and to refer the cause generally.

7. The petitioner may convert his petition into a bill.

8. A defendant may file a dissent to the petition being heard before the Master.

9. In that case the petitioner must convert his petition into a bill within four weeks.

10. An order to convert a petition into a bill to be of course, and to be served on all parties who have appeared to the petition.

11. All such parties to be parties to the bill without service

of subpoena, but the time for answering to commence from the notice of the conversion of the petition into a bill.

12. A defendant dissenting as above to pay all costs up to the hearing, unless the Court order otherwise.

13. A defendant to a petition referred to the Master must carry in his statement of defence within four weeks.

14. A defendant may carry in a further statement of defence to an amended petition within the time allowed for a further answer to an amended bill.

15. Otherwise no second statement of defence as to the same matter is allowed.

IV. As to Proceedings before the Master upon a Charge.

1. Warrants to consider the decree unnecessary.

2. All special orders of reference to fix a time for charges to be carried in thereunder.

3. Under a general order of reference, charges to be carried in within three weeks from the time when the order is drawn up or served.

4. The Master to fix a time in causes heard before him for charges to be carried in.

5. Parties making default cannot carry in a charge without leave.

6. Notice of all charges and amendments to be served on all parties.

7. Under a special order of reference, the notice to specify a time fixed by the Master for carrying in countercharges.

8. Under a general order of reference, three weeks allowed for carrying in countercharges.

9. Fourteen days allowed to carry in a countercharge to an amended charge.

10. Otherwise no further countercharge can be carried in without leave.

11. Separate charges to be disposed of separately, unless by order of the Master.

V. As to the Amendment of Pleadings before the Master.

1. An order to amend clerical errors may be obtained at any time.

2. An order to amend a petition or charge is of course before the statement of defence or countercharge is carried in.

3. One order to amend a petition or charge generally may be obtained as of course at any time before the statement of defence or countercharge is carried in.

4. One order to amend a statement of defence or countercharge may be obtained as of course at any time before the petition or charge is at issue.

5. A special order to amend may be granted before the petition or charge is at issue on affidavits similar to those required by the 67th Order of May, 1845.

6. And after the petition, &c. is at issue, on affidavits similar to those required by the 68th Order of May, 1845.

7. The 69th Order of May, 1845, to apply to such affidavits.

8. If the amendment is not made in fourteen days the order is null.

9. A special order to carry in a further charge, &c. may be substituted for a special order to amend.

10. Orders of course to amend before the Master to be obtained on petition at the Rolls.

VI. As to the Form of Pleadings before the Master.

1. Accounts to be set forth only by schedule, and not in the body of the pleading.

2. The 122d Order of May, 1845, to apply to proceedings before the Master.

3. and 4. Parties may use their petitions, bills, or answers, or any parts of them, as charges or countercharges on carrying in a statement of their intention.

5. A charge and countercharge cannot be combined.

VII. As to Proceedings by way of Supplement and Revivor before the Master.

1. Supplemental matter may be introduced by amendment until the hearing.

2. After the hearing by carrying in a charge.

3. and 4. Suits may be revived, or extended to parties born after they were commenced, by an order made on a show cause warrant against such persons or their guardians or committees.

5. Cause to be shown within fourteen days after service.

6. If a suit abates by the death of a plaintiff, the Master may compel the survivors or the representatives of a sole plaintiff to revive.

VIII. As to the Mode of bringing Proceedings to an Issue, and as to Evidence before the Master.

1. On a petition, six weeks are allowed after the statement of defence is carried in to amend, set down the petition for hearing, or put it at issue.

2. On a charge, four weeks on a general order of reference, and a time fixed by the Master on a special order, are allowed after the counter-charge is carried in to amend, set down the charge for hearing, or put it at issue.

3. Notice of the time when the petition or charge will be at issue to be served.

4. On a special order of reference, the notice to contain a time fixed by the Master for bringing in evidence.

5. and 6. In other cases six weeks allowed, and one week extra for affidavits in reply.

7. No affidavit or deposition admissible in support of petition or charge without a special order, unless the same is properly put at issue.

8. No further affidavits or depositions admissible after the time fixed, unless by an order made on proof of due diligence.

9. Any party before the Master may be examined *vivâ voce*, or on interrogatories.

10. Affidavits may be received in evidence after an examination *vivâ voce*, or upon interrogatories.

11. Publication is to pass at the end of the time limited for carrying in evidence.

12. Causes, &c. to be set down in one week after the time limited for carrying in evidence.

13. *Vivâ voce* examination to take place at the hearing, unless otherwise ordered.

IX. *As to the Computation of Time before the Master.*

The periods of vacation mentioned in the Order of May, 1845, are to be excluded in all computations of time before the Master.

X. *As to Proceedings on Default before the Master.*

1. Any party may apply to the Court for the carriage of an order of reference, if there be four weeks delay in acting upon it.

2. Any party may carry in a charge under an order or decree of the Master, if there be six weeks' delay in acting upon it.

3. On default in carrying in a statement of defence or countercharge, the opposite party may serve notice of his intention to obtain judgment without delay.

4. After such notice, the defaulting party can bring in his defence, &c. only by leave, and on payment of all costs thereby occasioned, unless the Master order otherwise.

5. The petition or charge to be at issue in fourteen days after service of the notice.

6. A party in default may carry in evidence notwithstanding.

7. If a petitioner does not amend, set down the petition for hearing, or put it at issue in due time, the defendant may apply to have the petition dismissed.

8. If the person who has carried in a charge does not amend, set it down for hearing, or put it at issue, in due time, the opposite party may serve a notice that the charge will be at issue at a time fixed by the Master.

9. A charge may be set down for hearing by the opposite party at the end of eight weeks after it is at issue.

10. On default at the hearing of a charge, either party may proceed *exparte*.

XI. *As to the Decrees and Orders of the Masters, and Appeals therefrom.*

1. The Decrees, &c. of the Master to be passed and entered as the Lord Chancellor shall direct.

2. The decrees, &c. to refer to the evidence, and state the facts proved, and any evidence rejected, or inquiries refused.

3. The decrees, &c. not to be reheard except by the Master, but may be appealed from by petition or motion.

4. Decrees, &c. may be referred back to the Master to receive evidence rejected, or make inquiries refused.

5. The statements in the decrees, &c. of the Master to be taken as proved where not specifically objected to, and no evidence to be admissible on appeal unless used or tendered before the Master.

COMMITTEE ON THE LAW OF PARTNERSHIP.

THE following reference was made to a Special Committee:—

“To consider the Law of Partnership, more especially with reference to the liability of Partners in Joint-Stock Banks and other undertakings.”

REPORT.

Your Committee have discussed the question referred to them at much length, having had the advantage of the assistance both of its commercial and its legal members. The result of this discussion has, however, not produced unanimity of opinion amongst the members of the Committee.

The opinion of the majority is in favour of allowing the formation of partnerships, in which the responsibility of certain of the partners shall be limited to the amount of capital agreed to be advanced by them, under such restrictions as may seem desirable for the prevention of fraud.

The restrictions which the majority of the Committee consider desirable for this purpose are stated in a subsequent part of this report.

A paper (No. I.), explanatory of the views taken by the majority of the Committee, has been drawn up by one of its members, and is laid before the Society at the request of

the Committee. A statement (No. II.) of the reasons which induce the minority of the Committee to object to the proposal for enabling partners to limit their responsibility,—and a further paper upon the subject (No. III.), drawn up by other members of the Committee, are also laid before the Society at the request of the Committee.

The majority of the Committee have come to the following resolutions :—

1. That it is advisable to allow the formation of partnerships, in which, while the liability of the ostensible and active partners continues unlimited, parties who take no active share in the business, and whom it is proposed to call limited partners, should be able to restrict their liability to the amount of capital agreed to be advanced by them.

2. That the names of all the members of such partnerships, and the amount of capital agreed to be advanced by the limited partners, should be registered.

3. That a limited partner should not be allowed to take any active part in the management of the firm.

4. That every limited partner should be required to pay up the amount agreed to be advanced by him before his name is registered.

5. That no limited partner should be permitted to diminish the amount agreed to be advanced by him.

6. That a limited partner retiring from the partnership should continue liable in respect of debts incurred during his continuance in the partnership for a definite period, according to the analogy of Joint-Stock Companies.

7. That the wilful violation of any of the above provisions by a limited partner should subject him to unlimited responsibility.

Your Committee wish also to express their opinion, that the recognition of the species of partnership contemplated by the above resolutions should be accompanied by increased facilities for the adjudication of questions incident to partnership, and for the administration of partnership property in litigation, or upon the winding-up of partnerships; for the introduction of which the recent act for winding up joint stock companies appears likely to pave the way.

They are of opinion, also, that the fraud or misconduct of

persons in their commercial relations require to be checked by improvements in the law of debtor and creditor, and by punishments more adequate to the end than the mere denial of certificates, or the other means now in force.

(PAPER No. I.)

Statement referred to in the Report made by the Committee on the Law of Partnership, explanatory of the views entertained by the Majority of the Committee, to whom the above question was referred.

Partnership, according to the law of England, is considered to exist wherever two or more persons agree to combine property or labour for the purpose of a common undertaking, and the acquisition of a common profit.¹ In this definition of partnership the English law does not differ from the Civil Law, or the laws which have grown out of it.² It is in the principle which it recognises as the sole basis of the contract, and in the consequences thence resulting, that the English law materially differs, as will afterwards appear, from the laws which have arisen more directly out of the Roman jurisprudence. This principle is the doctrine applied to all ordinary trading partnerships, that each partner is the accredited agent of all the rest, and has authority as such to bind them, either by private contracts respecting the goods or business of the firm, or by negotiable instruments circulated in its behalf to any person dealing *bonâ fide*³; whence it follows, that each partner is as much bound to fulfil any engagement of the above nature entered into by his co-partners on his behalf, as if he had entered into it personally.

¹ Smith's Mercantile Law, p. 19. 4th ed.

² Pothier defines partnership by the Civil Law to be, "*contractus de conferendis bonâ fide rebus aut operibus, animo lucri, quod honestum sit ac licitum, in commune faciendum.*" Pand. xvii. tit. 3. introd. The definition of the Code Napoléon is as follows:—"La Société est un contrat par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun dans la vue de partager le bénéfice qui pourra en résulter." Art. 1832.

³ Vere v. Ashby, 10 B. & C. 288., and the cases cited in Smith's Mercantile Law, p. 37. 4th ed.

In respect to the right in one partner to bind another by negotiable instruments circulated on behalf of the firm, the law does indeed allow some modification to this rule. In some kinds of partnership, as *e. g.* in a partnership for carrying on the business of a solicitor¹, or a farmer², such an authority is not implied; and generally in joint-stock companies, it must be given, either expressly or by implication from usage³; and even where it generally exists, a creditor who has notice of an agreement between the partners not to exercise the right, cannot enforce a security of this sort against a partner who has not personally given it.⁴ The creditor may also be restrained from enforcing his claim against the members of a firm by a special contract to confine his demands to the partnership assets, as is customary in the case of policies of assurance.

But subject to these qualifications the general law of England is, that each partner is exposed to an unlimited liability for the acts of any co-partner in the business of the firm. This principle the law applies equally to the active or ostensible members of a firm, and to those secret or dormant partners, who may have taken no part in its affairs beyond contributing their capital, and of whose existence as partners the party contracting with the firm may have been unaware⁵, and extends it to any person who by his acts may have led parties contracting with a firm to suppose that he was a partner, though he may not be entitled to any share in the profits.⁶

The only mode of escaping from the danger of an unlimited responsibility for each other's acts, which the law of England affords to partners, is by the special intervention of the Crown, or the operation of a private law.⁷ The Sovereign,

¹ *Headley v. Bainbridge*, 3 Q. B. 306.

² *Greenslade v. Dower*, 7 B. & C. 635., 1 M. & R. 640.

³ *Dickenson v. Valpy*, 10 B. & C. 139., 5 M. & R. 126. *Bramah v. Roberts*, 5 Bing. N. C. 963.

⁴ *Lord Galway v. Matthew*, 10 East, 264. Parke B. in *Hawkes v. Bourn*., 8 M. & W. 710.

⁵ 1 Dougl. 371.

⁶ See *Smith's Mercantile Law*, p. 23.

⁷ The anomalous cases in which the Courts have held, that a share of profits

by virtue of the prerogative, may grant to any body of persons a charter of incorporation¹; whereupon, as a general rule², the personal liability of the members ceases, and the remedy of the creditor is confined to the corporate property. And under a recent act of Parliament, the same immunity may be conferred by letters patent without the grant of a charter of incorporation.³ The Legislature also has repeatedly given the same privilege to joint-stock associations, formed for purposes considered to be of public utility, by a private law sanctioning their formation, of which railway acts are a familiar example. Other inconveniences which formerly affected large partnerships, — as, for example, the difficulty of suing and of being sued, — have been removed by the act recently passed for incorporating joint-stock companies.⁴ But the privilege of exemption from personal liability is expressly excluded.⁵

Under the English law, therefore, there are two kinds of partnerships only so far as concerns the liability of partners, viz. 1. Partnerships formed by the mere voluntary act of the partners without the interference of the government, in which all are responsible without limitation; — 2. Partnerships under which, by the sanction of the government, the responsibility of all is alike limited.⁶ If we now turn our attention to the laws of other great trading countries, both in Europe and America, we shall find a distinct recognition of a third class of partnerships, combining both sorts of partners, which has arisen out of a distinction overlooked by the English courts, but admitted by the Civil Law, and many of the laws founded

may be received without creating a partnership, can scarcely be considered as forming an exception to this proposition.

¹ Black. i. 473.

² Corporations formed for the purpose of banking are an exception; the 7 G. 4. c. 46. s. 13. expressly makes the members personally liable.

³ 7 W. 4. & 1 Vict. c. 79.

⁴ 7 & 8 Vict. c. 110.

⁵ Section 25.

⁶ There is, strictly speaking, a third class, namely, partnerships in which the legislature has specially interfered to give some of the privileges of a corporate body, without that of freedom from responsibility; but these may be classed under the first head.

upon it, the distinction, namely, between a secret and an avowed partnership.

If A., B., and C. combine to carry on any business, and publish their connexion to the world, the English doctrine that each thereby makes the other his agent for carrying on that business, and therefore cannot disown his agent's acts, or refuse to satisfy the engagements *bonâ fide* contracted by a third party with that agent, is quite reasonable. It is the doctrine also of the Roman and the modern European law.¹ In France, for example, this kind of partnership is well known under the name of *Société en nom Collectif*.²

But if A. and B. merely furnish funds to carry on a business in which C. alone is the ostensible manager, upon a stipulation, as between themselves, that they shall have a certain proportion of the profits, what right has a third party—the creditor, who knows nothing about A. or B., who contracts with C. alone, and gives credit to him alone—to call on A. and B. to fulfil C.'s engagement? Or, supposing that such a creditor should discover that A. and B. have made or promised to make advances to C. on the condition before mentioned, what is there in this agreement to justify the assumption that they have authorised C. to pledge their credit beyond the extent of the funds thus advanced or promised? The English law holds that, by such an agreement, A. and B. impliedly make C. their agent to do all acts relating to the partnership business for them. But how does the transaction support such an inference? Why is this implied agency to be inferred from an agreement for a certain proportion of the profits, more than from an agreement to receive a certain rate of interest out of those profits,—an agreement from which the English law admits that no such inference can be drawn? The fund out of which the creditors are to be paid is obviously smaller in the latter case than in the former; since the advances, which constitute part of that fund in the one case, rank as claims against it in the other. But let it be once settled that A. and B. do not

¹ Pand. xvii. tit. 2. l. 73. § 1. l. 82. See Pothier, Pand. xvii. 2. . .

² Code de Commerce, art. 22.

make themselves liable to fulfil C.'s engagements, by privately advancing to him funds with which to carry on any business, on condition of receiving a proportion of the profits, and the way will be opened for a third species of partnership, technically known as partnership *en commandite*,—intermediate between the two kinds alone recognised by the law of England,—in which C. is responsible, without limitation, for his own engagements, while the liability of A. and B. is restricted to the funds furnished or agreed to be furnished by them.

It has been stated above that the principle upon which the existence of this species of partnership depends appears to have been admitted by the Roman law, under which the extent of liability incurred by a partner depended upon the kind of agreement which subsisted between the partners, of which the Civil Law recognises several varieties¹; so that the jurists, who have derived their ideas from this source, hold that it lies upon the creditor of one partner, if he would make his co-partners responsible, to ascertain the nature of the partnership, and see that the partner with whom he contracts is acting within the limits of the authority given him.² To what extent this particular species of partnership itself was in use among the Romans is not very clear. That they were acquainted with contracts very nearly approaching it is proved by a law referred to by an eminent French jurist, M. Pardessus, in his investigations upon this subject.³ But it is clear that it was well known, and extensively practised, from a very early period in the modern history of Europe, by the inhabitants of the great commercial cities situate on the Mediterranean. It is recognised by the code called the Laws of the Crusaders.⁴ The compilation known as the Consulate of the Sea, which dates at least from the fourteenth century, and seems to have formed in some sort a generally recognised maritime and commercial code for the Mediter-

¹ Pand. xvii. tit. 2. l. 44. 52. § 4. 67., § 1.

² See Felicio de Societate, xxx. § 2. and 3. The English law recognises the same principle, at least to this extent, that the contract must respect the goods or business of the firm.

³ Pand. xix. tit. 3. Pardessus, Collection des Loix Maritimes, i. 372.

⁴ Probably as early as the 13th century. Pard. u. s. l. 276. 280.

anean, contains numerous regulations respecting it.¹ Special provisions relating to it are found among the laws of Montpellier², of Marseilles³, of Genoa⁴, of Ancona⁵, of Barcelona⁶, of Pisa⁷, and of Florence⁷, as well as in those of some other smaller cities⁸; an ordonnance of the French king, A.D. 1315, declares that it is not to be considered as usurious.⁹ The investigations of M. Troplong, another eminent writer on French law, seem, indeed, to have established that its frequent use in Italy was in great measure due to its affording the nobility the means of escaping from the ecclesiastical anathemas against usury, and partaking in the profits of trade without compromising their dignity; and that to the resources obtained by its means much of the early commercial prosperity of the Italian states is to be traced.¹⁰

In France, the noted ordonnance of Louis XIV., framed by the advice of Colbert for the encouragement and regulation of commerce, recognises and sanctions it¹¹; and from that time to the present it would appear to have held an important place in the French commercial system.

But the overthrow of all ancient establishments consequent upon the Revolution of 1789, gave rise to many abuses in the application of the system, unfettered as it then

¹ See § 165—176.; 210. 234. 242. 244. 247. Pard. u. s. ii. For the character of this compilation see the preliminary dissertation, especially p. 18—26. For its adoption by Venice see Pard. u. s. v. pp. 9, 10.

² A. D. 1223. Pard. u. s. iv. 255.

³ A. D. 1253—1255, Id. iii. c. 15. 19—25. Id. iv. 263. 266.

⁴ A. D. 1538, iv. c. 13. Id. iv. 527. It appears that there was a modification of the principle known as "*Impietta*," the precise difference between which and "*Commanda*," is explained in *Casa Regis de Commercio*, ch. 28.

⁵ A. D. 1397, § 50. and 80. Pard. u. s. v. 162. 189.

⁶ A. D. 1258, § 6. 15. and 16. A. D. 1271. A. D. 1283, § 69. 72. A. D. 1304, and A. D. 1341. Pard. u. s. v. 343—371.

⁷ Troplong, *Droit Civil Expliqué*, xii. p. 359. Pard. iv. p. 571. A. D. 1160.

⁸ E. g. Trani, in the two Sicilies, A. D. 1063; Pardessus, u. s. v. 283.; Sar-rari, in Sardinia, A. D. 1316, § 133. Ib. v. 282.; and Bonifacio, in Corsica, A. D. 1609. Ib. vi. 597.

⁹ Pard. ii. cxvii.

¹⁰ Troplong, *Droit Civil Exp.* xii. p. 357., and Preface, p. 69.; and see *Casa Regis de Com.* xxix. 24.

¹¹ Troplong, u. s. xii. 368.

was by any restrictions. Regnaud, in his speech before the Council of State in 1807, on laying before that body the articles of the Code of Commerce intended to be applied to its regulation¹, speaks of the necessity of preventing the "fraudulent speculations which had been audaciously conducted under unknown names, by the aid of which the most hazardous operations in trade, in banking, in stock-jobbing, had been carried on, while, if fortune proved unfavourable, the nominal managers were abandoned to the obscure disgrace of a concerted bankruptcy;" and the present French law relating to partnerships *en commandite* was adopted to obviate these evils, by subjecting the right of entering into such contracts to certain restrictions.

The restrictions imposed with this view were — 1. The prohibition of the commanditaires taking any part in the business of the firm, even as agents for the managing partner, called in the French law *le gérant*²; — 2. The public registration of a statement of the terms on which, and the period for which, the partnership is formed; of the names and addresses of the managing partners, and of the sums which the other partners had furnished, and those which they are bound to furnish; — a statement which is required to be made public in every *arrondissement* in which the partnership has a place of business, within fifteen days after the execution of the deed of partnership, under the penalty of the nullity of the agreement as between the parties, but without affecting their liability to third persons.³

The names of the commanditaires are not required to be published; it being considered that this would be useless, since the credit given is not to the personal responsibility of the commanditaires, but to the funds supplied by them; and that one of the advantages of the system is the allowing

¹ Exposé des Motifs de la Loi. Code de Commerce, Loaré, Legislation de la France, xvii. 350. See also Troplong, u. s. xii. 395.

² Code de Commerce, art. 27. Regnaud's Speech, u. s. This restriction called forth much opposition. See Troplong, Droit Civil, xii. 391. The commercial tribunals of Brussels, Douai, Orleans, Geneva, Havre, Lyons, Marseilles, Strasburg and Toulouse, were unfavourable to it.

³ Code, art. 39—42.

parties to supply funds to commercial enterprises without permitting their names to appear.¹ A false statement of the amount of funds guaranteed would, it appears, draw after it the liability to imprisonment for a period which cannot be less than one year, and may be extended to five.² The liability of the commanditaire in such a partnership is restricted, by the terms of the code, to the funds qu'il a mis ou dû mettre³; a phrase upon which the French tribunals have put conflicting interpretations: it having been considered on the one side that the sums which the commanditaire may have received as profits from the business must be taken into account and charged against him, and on the other side that the account is to be confined simply to the sum which he has contracted to pay, and that the profits received by him are not liable to be refunded unless a case of fraud can be established. The latter interpretation is sanctioned by a decision of the Cour de Cassation, and seems to be regarded as the correct one.⁴ It appears to carry out the intentions of those who framed the law.⁵

The responsibility of the 'gérant,' in whose name alone the firm is carried on, is, as has before been observed, unlimited; and it is a consequence of the mixed character of the original engagement between himself and his commanditaires, that he remains a debtor to them for whatever advances they have made; and that they are, so far, in the situation of creditors, although as between themselves and the parties who have dealt with the firm, they are debtors to the amount of the stipulated advance, and can be compelled to fulfil their engagement, either by the gérant while the firm subsists, or by its creditors, should it fail.⁶ It would appear, however,

¹ Rogron, Code de Commerce Expliqué, note to art. 42.

² Code Pénal, art. 405. Rogron, u. s.

³ Art. 26.

⁴ See Rogron, note on art. 26. of the Code. Dalloz, Recueil Périodique for 1833, 2. 244. Ib. for 1844, 2. 175., where a stipulation in the deed that a commanditaire should be at liberty to receive 6% per cent. annually, was sustained against creditors. For the conflicting decisions see Dalloz, Recueil Alfabétique, xii. 137.

⁵ Séance du Conseil d'Etat., Feb. 14. 1807; Loaré, Legislation de la France, xvii. 259.

⁶ See Dalloz, Recueil Périodique, 1833, 2. 243. note.

that this liability must be materially affected by the recognised right of the commanditaires to be consulted as to the affairs of the partnership¹, a right which it is considered to be their duty to exercise.²

The commanditaire who takes any part in the administration of the business, beyond the expression of opinion as to the conduct of it, becomes liable to an unlimited responsibility, at least towards third parties³: whether he thereby also shares the liability of the formal gérant towards his co-commanditaires is a question apparently still in dispute.⁴ The consideration of what acts do, and what do not, amount to such an interference with the management of the business as is followed by this responsibility, has given rise, as might be expected, to much discussion.⁵ A semi-legislative declaration of the Council of State⁶ settled that a commanditaire did not incur this penalty by dealing with the firm on his own account; so that, for example, a commanditaire in a firm formed for running public conveyances may supply the carriages to the firm, or, again, a commanditaire may receive a salary, as a hired servant, from the firm, without losing his character of commanditaire.⁷

The code expressly permits the capital of a partnership *en commandite* to be divided into shares⁸, which the Courts, in the year 1830, decided may be made transferable by the mere delivery of the share or certificate.⁹ A power which the framers of the code do not seem to have intended that the commanditaires should possess.¹⁰

Such is the present state of the French law as to this third species of partnership intermediate between the two kinds

¹ See Observations des Sections réunies au Tribunat, 10th March, 1807. Loaré, u. s. xvii. 308.

² Troplong, u. s. xii. 395.

³ Code, Art. 28.

⁴ Troplong, u. s. xii. 421.

⁵ Ib. pp. 427—429.

⁶ August 29th 1809. Loaré, u. s. xvii. 461.

⁷ Troplong, u. s. xii. 417.

⁸ Art. 38.

⁹ Dalloz, Recueil Périodique, 1832, 2. 107. 123. In the language of the French law, such a company is said to have its capital divided into *actions au porteur*. Troplong, s. xiii. 161.

¹⁰ See the reason given by M. Regnaud, Loaré, u. s. xvii. 351., for requiring the sociétés anonymes to have the authorization of the government.

before alluded to, both of which are also in frequent use in France; namely, partnerships *en nom collectif*, of which mention has been previously made, and partnerships analogous to such English joint-stock companies as have obtained a charter or an act of parliament limiting the responsibility of their members, which are designated in the French law as *Sociétés Anonymes*.¹ The latter partnerships cannot be formed without the sanction of the government. They take their title from the circumstance that there is no person by whose name the company is designated, and in them no one, whether manager or not, is responsible beyond the amount of the shares taken by him.

It has appeared desirable to enter thus minutely into the statements of the Law of Partnerships *en commandite* in France, both because the true nature of these partnerships will probably be best perceived from the form assumed by them in a country where they arose spontaneously, and have so long existed, and on account of the extensive acceptance of the Code Napoléon in the other countries which were brought under the sway of the Emperor. At the present time the French Code de Commerce constitutes, or serves as the foundation of the law of Piedmont, Tuscany, the Papal and Neapolitan States, Spain and Portugal, Belgium and Holland.²

In the North of Europe the species of partnership which we have been considering seems not to have taken root. No provisions relating to it are to be discovered in the laws of Oleron, or those of the Hanse Towns³—the great sources of northern commercial law. In Scotland, too, the recognised doctrines appear to be similar to those received in England⁴; and the only approach to a partnership *en commandite* is made, by the ambiguous transactions known as a joint trading, a species of dealing which the law of England in like manner

¹ Code de Commerce, art. 29, 32, 37.

² See Reddie, *Historical View of the Law of Maritime Commerce*, pp. 284, 285, 289, 319.

³ See Pardessus, *Loix Maritimes*, i. ch. viii. ii. ch. xiv.

⁴ Bell's *Com.* vii. § 1205, and 1208.

acknowledges¹; but with the result only of opening a field for legal ingenuity to dispute whether certain parties are partners or not.

In Germany, however, the principle on which it depends is widely recognised. The Austrian Code provides that the members of a firm whose names are not announced shall in no case be answerable for more than their share of the capital.² By the Prussian law³ a person is allowed to entrust his capital to a firm at a higher rate of interest than the law allows generally, if he will stipulate to share the risk in proportion to his capital, it being expressly provided that the creditors of the firm shall have no claim upon him beyond that amount. And by the laws of Frankfort, a person who lends his money to a partnership without taking any part in the management, on condition of a share in the profits, is not liable to any further claim in consequence of the inability of the partnership to meet its engagements.⁴

The practice of forming partnerships *en commandite* is, however, not confined to Europe. It exists also extensively in the United States. The Code of Louisiana admits it under the title of partnership *in commandam*⁵: and it is stated by Mr. Kent to have been authorised by statute in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Maryland, South Carolina, Georgia, Alabama, Florida, Mississippi, Indiana, Michigan, and New York.⁶

The provisions of the Code of Louisiana substantially resemble those of the French Code, which serves as the basis of its legislation. The question upon which the French Courts have been divided, as to the liability of partners to "repay dividends received out of net profits fairly made

¹ *Gowthwaite v. Duckworth*, 12 East, 426. *Barton v. Hanson*, Cowp. 97. Bell Com. vii. ch. 2. § 3.

² All. Landrecht, für die Deutschen Erbländer, A. D. 1811, § 1204.

³ All. Preuss. Landrecht, i. tit. 17. § 248—250.

⁴ Reform, tit. 9. § 27. See *Adlerpflicht Privat-Recht*. § 498.

⁵ Civil Code, A. D. 1824, art. 2810—2822.

⁶ Kent's Com. on American Law, iii. 34.

during the solvency of the partnership," is here expressly decided in the negative.¹

The conditions under which the establishment of this species of partnership is permitted in the other states above enumerated are, as we learn from Mr. Kent's Commentaries, nearly the same as those adopted by the law of New York, to which they are subsequent in date.² It seems, therefore, sufficient to mention the provisions of that law. They are somewhat more stringent than those imposed in France. For instance, before such a partnership can commence operations, the parties who are desirous of forming it are required to register, for public inspection, the names and residences of the commanditaires, known in America as "special partners," in addition to the other particulars required to be registered in France³; and the gérants — there called the general partners — are required to make affidavit that the sums agreed to be contributed have been paid.⁴ Any false statement, made by the general partners, in these respects, makes all persons interested in the partnership "liable for all the engagements thereof as general partners."⁵ Again, no partner is permitted to transfer his share in the partnership property during the continuance of the partnership⁶; and it is expressly provided, that if "by the payment of interest or division of profits, the original capital has been reduced, the partners receiving the same shall be bound to restore the amount necessary to make good his share of capital, with interest."⁷ In France it has been shown that the partner would not be obliged to refund past profits unless in a case of fraudulent dealing.

Lastly, it may be observed, that by an Irish Act of the 21 & 22 Geo. 3., the formation of partnerships *en commandite* was permitted in Ireland to a certain extent, the capital of these partnerships being limited to 50,000*l.*, and their dura-

¹ Code, § 2814.

² Kent's Com. Laws of New York, U.S., A.D. 1822, sess. 45, c. 244. and sess. 50. c. 238. Revised Statutes, i. 764. The statute is printed in the Appendix to the Report on Joint-Stock Banks, 1844, p. 309., and in Dr. Mackenzie's Work on Partnership *en Commandite*, p. 244.

³ Law of New York, cit. sup. sects. 4, 5, 6.

⁴ *Ib.* s. 9.

⁵ *Ib.* s. 15.

⁶ *Ib.* s. 8.

⁷ *Ib.* s. 16.

tion to fourteen years. The statute does not appear to have been acted upon, though for what reason it is not easy to ascertain. One cause may perhaps be found in a provision¹, by which half the net profits are required to be laid by annually to form a reserve fund for the payment of the creditors in case the concern should fail, the surplus, or the whole if not required for the payment of debts, being divisible among the partners at the end of the stipulated term of the partnership, but not till that period.

The question whether it would be expedient to allow the formation of partnerships *en commandite* in England, was brought under the consideration of the Committee of the House of Commons, which made inquiry into the laws affecting Joint-Stock Companies in 1844; but that Committee, to use the language of the report, "forbore to express any opinion upon it, because, though highly worthy of consideration, it did not appear to fall within the scope of the reference made to them." However, in the appendix to the report made by the Committee, will be found a report drawn up by Mr. Bellenden Ker in 1837, for the Board of Trade, in which this question is discussed; and in the evidence taken before the Committee, and in the answers given to queries circulated in 1837 by the Board of Trade, printed also in the appendix to their report, are to be found the opinions of many eminent merchants and lawyers upon the subject.

The expediency of such an alteration is, however, a point upon which much diversity of opinion may be expected to prevail; and it is therefore not surprising to find many persons whose judgment is entitled to much weight, opposed to it; as, for example, Mr. Jones Loyd, Mr. Thomas Tooke, Sir Geo. Larpent, Mr. Horsley Palmer, Mr. M^cFinlay, and Sir John Gladstone. On the other hand, however, Mr. Duncan, Mr. G. W. Norman, Mr. F. Baring, the late Lord Ashburton, and Mr. Senior, express themselves in favour of the alteration; and Mr. Bellenden Ker seems also to have been of the same opinion. The arguments adduced for and against the change may be shortly summed up as follows.

¹ Sects. 6, 7.

In opposition to the proposal it is maintained —

That there is no want of capital, at least in Great Britain, ready to be embarked in any enterprise of a promising character. — That the relaxation of the usury laws enables capitalists to lend their money on terms commensurate to the risk run, which they may or may not enforce at their pleasure. — That to give greater facility for obtaining capital will increase the tendency to rash speculation and fraud, from which the community already suffers so much. — That the proposed system would encourage persons possessed of small incomes to embark in commercial enterprises, of the probable success of which their circumstances make them unable to form a correct estimate. — That it is not just to allow parties to receive an unlimited amount of profit with a limited responsibility for loss. — And that business will not be well done when the stimulus of unlimited responsibility is removed.

On the other hand it is contended — That there are numerous cases in which a great and injurious difficulty in procuring capital exists in Great Britain. — That many persons would advance their money as partners, with a view to obtain a share in the profits of the firm, who are not in the habit of advancing it formally as a loan at interest, a course attended with more difficulty. — That this is shown by the large sums invested in foreign stocks, or the shares of any companies which offer freedom from further demands. — That if a similar freedom from responsibility could be ensured in ordinary commercial undertakings, enterprise, of a healthy character inasmuch as it would be based upon sufficient capital, would be fostered. — That the present state of the commercial law does not prevent the occurrence of a vast amount of fraudulent or rash speculation, leading to bankruptcy and insolvency, and therefore only restrains individual enterprise without effecting the good which is alleged as the justification of the restraint. — That there is no injustice in limiting the amount of loss to the capital embarked, to which of necessity the amount of profits must bear in each particular trade a direct relation, dependent only on the profits of that trade. — And that in fact the system of *commandite* is far more just to creditors than the system of private loans, under which the

capitalist may enable a trader to obtain a fictitious credit, securing to himself large interest while the business prospers, and a priority of claim upon the assets if it fails.

The weight of English authority must be admitted to be on the whole against allowing any limitation of the responsibility of a partner, unless by the authority of the Crown or the Parliament. There are, however, some circumstances which tend to diminish the weight due to that authority.

I. The objections made to the allowance of this species of partnership seem in part to arise out of the persuasion that our present law of Debtor and Creditor, by the absence of adequate punishment for fraud, fosters a fraudulent spirit in the trading community; and that therefore we in England could not bear the introduction of limited responsibility into partnerships, though if the law of Debtor and Creditor were altered, such partnerships might be useful.

II. It appears to be assumed by those who object to partnerships *en commandite*, that this species of partnership would produce in England, from the peculiar state of society which prevails there, mischiefs which it does not appear to have produced where it has been tried. Therefore, unless this apprehension be assumed to be correct, the objection must be considered as opposed to the observed facts, rather than supported by them.

III. The persons who have had most opportunity of examining the operation of the system, seem generally impressed in its favour. Lord Ashburton and Mr. F. Baring, for instance, who are both in favour of allowing partners to limit their responsibility, are well known to be connected in trade with the United States, over a large portion of whose territory limited partnerships are permitted. Again, in France, M. Regnaud, in the very speech before referred to¹, in which he states his reasons for subjecting partnerships *en commandite* to certain restrictions to prevent fraud, speaks of them as to be favoured, "inasmuch as they permitted every owner of capital to take a share in the lottery of commerce, added food to circulation, increased its activity, and multiplied by a community of interest the social ties between the funded pro-

¹ Séance du Conseil d'Etat, Sept. 14th, 1807. Loaré, u. s. xvii. p. 351.

prietor and the manufacturer, the capitalist and the retail dealer, the highest persons in the state and the humblest traders." A similar impression in favour of this species of partnership is apparent in many of the decisions of the French courts, and arguments of their jurists, cited above.¹ It is true that this favourable opinion is not wholly unmixed. It appears from M. Troplong's statements, that soon after the decision had been pronounced by which the unlimited transferability of the shares in such partnerships was sanctioned, associations *en commandite*, consisting of large numbers of shareholders, were set on foot, such, for instance, as the rival companies for running diligences, and that much apprehension of the consequences of permitting such companies to be formed, without the previous sanction of the government, was felt.² M. Troplong, indeed, writing in 1843, treats this ferment as having died away, from the experience that the anticipated evil had not arisen, and deduces from it a warning against any hasty alteration of the French commercial code "by pretended friends of progress or opponents of every new element."³ But a private communication from an eminent French merchant, laid before the Committee, takes a different view of this subject. The writer expresses his approval of partnerships *en commandite*, if limited to a small number of partners, but considers that the doctrine of the transferability of the shares had "introduced a taint into the constitution of these partnerships and turned them away from their true object," and that in consequence many fraudulent undertakings had been entered into, and many large enterprises set on foot, by *gérants* who had ruined them through their rash speculations. This unfavourable opinion, however, as appears from what has been said, applies not to the long established practice of partnership *en commandite*, but to a modification of it introduced at a recent period.

IV. The evidence in favour of these partnerships contains some specific statements of successful results arising on a

¹ See sup. the opposition to the restriction by which the *commanditaires* were excluded from acting as *gérants*, p. 11. note ².

² Vol. xii. s. 147. et seq.

³ *Ib.* s. 149.

large scale from this system in France and in America. For instance, Mr. A. Levinger, in a statement to be found in the Appendix to the Joint-Stock Banks Report, 1844¹, in addition to an individual case of success mentioned by him, describes the considerable manufacturing town of Mulhausen, in France, as having been created by capital furnished *en commandite* by Swiss houses in Zurich and Basle; and Dr. Mackenzie, in his recent work on Partnership *en commandite*, gives a similar account of the great American manufacturing town of Lovel.² On the other side, no specific instances of great failures or mismanagement arising from the system have been adduced.

V. The experience of France, where the actual workings of the system must be well known from long trial, furnishes, in the desire shown by the public to form such associations, no inconsiderable argument in their favour; at the same time that it shows that the kind of partnerships with which we are familiar are very well able to maintain their ground alongside of those where the responsibility is limited. It appears, from the statements in a recent statistical publication called the "Annuaire de l'Economie Politique et de la Statistique," that, in the course of the year 1845, there were formed, in the whole of France, 2748 partnerships³, of which 2080 were *en nom collectif*, i.e. with unlimited responsibility; 29 *anonymes*, i.e. joint-stock companies, with limited liability; and 649 *en commandite*, 229 of the latter having their capital divided into transferable shares.

Lastly. The account of the cloth-mills in Yorkshire, also contained in the Appendix to the Joint-Stock Banks Report, shows that some commercial enterprises may be successfully carried on in England by an association of small capitalists.⁴

For these reasons greater weight appears to be due to the arguments in favour of the expediency of permitting part-

¹ Page 321.

² Page 101.

³ Page 138. A large proportion of these partnerships seems to have been formed in Paris, the numbers being 559 *en nom collectif*; 310 *en commandite*, (p. 192.) The latter numbers are stated to differ but little from those of the preceding year.

⁴ P. 348—352.

nerships with limited responsibility to be formed, than to those of an opposite tendency.

But if the true legal doctrine on this point be such as has been contended, a very strong additional argument for permitting the formation of such partnerships is thence derivable. It is the generally received maxim of the present age, that the law, while it should take due precautions against fraud, ought to leave its subjects to form their own engagements, on such conditions and in such form as their own experience teaches them to be most for their advantage. But the consequences which our law attaches to all agreements by which two or more persons agree to share the profits of any commercial enterprise between them, impose, as has been before shown, on a certain class of these agreements an arbitrary restraint, which cannot be justified by legal reasoning. It says, in fact, no persons shall be allowed to agree to share the profits of any trade or business between them, unless they will also agree that each of them shall have an unlimited authority to bind the others in all matters relating to that undertaking, to the extent of their whole fortune; that is, in favour of the creditors of the partnership, the law will always imply such an agreement, and thus give those creditors a remedy against persons of whose existence they may have been ignorant, and on whose credit they were never justified in relying.

The law of England, as has been before shown, now allows partners to limit the implied authority given by them to each other, so far as concerns the subject-matter of the contract. In regard to its form it goes further; holding that an authority to contract by deed can never be implied.¹ But it refuses them the right of limiting that authority in respect to the extent of the contract. I may enter into a partnership to deal in tenpenny nails only, and refuse to be answerable for sixpenny nails; but I cannot say I will be answerable for nails to the extent of 100*l.*, and no more.

It is submitted that this distinction is untenable in principle, and that the law ought to allow partners to give to those with whom they have entered into partnership—if

¹ Smith's Mercantile Law, § 6. p. 37.

they so agree—an authority to bind them, limited in the amount as well as in the nature of the obligation, such restrictions only being put upon contracts of this nature as may seem advisable to prevent a fraudulent abuse of the rights thus given.

The nature of the restrictions which, in the opinion of the majority of the Committee, it would be desirable to impose for this purpose, will be seen from their Report.

(PAPER No. II.)

Reasons against the Adoption of the Recommendation contained in the Report of the Committee of the Law Amendment Society appointed to consider the Law of Partnership, for allowing a Formation of Partnerships with limited Responsibility.

1. Because it is not called for by the commercial classes.
2. Because it is as inconsistent with the principle of English law, as with justice, that the risks and losses incidental to commercial speculation should not be borne by those who originate them, and who alone are to receive the profits, if any arise.
3. Because there is no want of capital to carry out any enterprise the prospects of which are capable of reasonable demonstration; and because whatever distrust exists in lending capital for commercial purposes arises from the want of adequate punishment for fraudulent trading, and would be removed by an improved law of Debtor and Creditor.
4. Because the evidence adduced in favour of the proposed change is vague and unsatisfactory.
5. Because in Ireland the limited liability of partners is sanctioned by law; but, owing to the checks provided to prevent its abuse, and especially that which requires the annual reservation of one half of the profits to meet losses which may arise, the Act (the 21 & 22 Geo. 3.) is inoperative.
6. Because there is great difference of opinion, amongst those capable of forming a sound judgment, as to the benefit

arising in France and America from the law of limited liability.

7. Because the reasoning in support of the proposed change is based on the partial practice of countries where capital is comparatively scarce, and whose commercial habits and customs are perfectly different from those in England.

8. Because any additional facility for commercial speculation, and the formation of joint-stock companies with limited liability, or any law under which unprincipled men with capital could shelter themselves, by the employment of agents, from the consequences of fraudulent or reckless trading, would be injurious to the commercial morality and permanent prosperity of the country, and tend to encourage the recurrence of periods of excitement and panic similar to those of 1824-5, 1836, 1841, 1845, 1846, and 1847.

9. Because whatever abuses have crept into the practice of partnership by the repeal of the Usury Laws, or whatever defects may exist in the practice or principle of the existing law, are either understood and practically avoided as far as our imperfect law of Debtor and Creditor will allow, or may be remedied without the proposed change.

10. Because the evils which always accompany a great change in the law, when even the necessity of the change is almost universally admitted, would in this case, for many years to come, be greater commercially, morally, and nationally, than any benefit the most sanguine supporter could expect to arise from it.

11. Because the true object of commercial legislation should be, to induce and to protect legitimate trading; to discourage rash and reckless speculation; to afford the utmost security to credit; to give the greatest facility for the recovery of debts; and, without interfering with the most perfect freedom in the employment of capital, to throw upon every one the full responsibility of all obligations incurred either by his own acts or by the acts of those whom he may employ.

And, lastly, because any deviation from this cardinal principle will inflict a severe blow upon the commercial enterprise and reputation of this great country.

(PAPER No. III.)

Paper upon the Subject of the Limitation of Responsibility in Partnerships, referred to in the Report of the Committee.

The extent to which the commandite principle of partnership has been carried in France and the United States of America is regarded by many as a proof of the general utility and advantage of the system, sufficiently strong to recommend its introduction into this country; but it has been alleged by competent judges that serious evils accompany it in France, as well as in America, owing to the frauds and litigation arising out of the uncertainty of the laws and usages by which it has been regulated; and they say that the large number of such establishments in France and America, and other countries, is owing principally to the capitals possessed by the mercantile and manufacturing classes not being sufficient to carry on the most extensive undertakings by individuals, as they are in England and Scotland. It cannot be said that large capitals are wanting in Great Britain for carrying on the usual undertakings in *commerce and manufactures* on the most extensive scale. But it may be alleged that in some kinds of business, as banking, mining, steam navigation, and some others, requiring a large outlay before adequate returns can be looked for, capital is not always ready to be advanced by respectable parties to a sufficient extent to answer the wants of our increasing enterprise at home and in our foreign dependencies. And the parties who urge this view state their belief, that if such increased facilities had existed for the employment of money by individuals, in limited amounts, during the last twenty years, the vast sums advanced by such parties, in loans, to the Spanish South American Republics and to the United States of America, and since then, in such a reckless manner and with such unsatisfactory results, in foreign railways, as well as a great number of those undertakings in Great Britain

and Ireland, would have been probably employed profitably in investments on the commandite plan for developing the resources and still undeveloped wealth of our own soil and mines, our sea coasts, and our foreign dependencies.

It may be admitted that many persons in England would be glad to entrust limited amounts to commandite partnerships who are now prevented, by their prudence and by the bad results of the joint-stock speculations of the last twenty years, from embarking any longer in companies in which they are subject to ruin from unlimited liability; but it is apparent that under our English laws of partnership, with individual liability unlimited by the law, all kinds of undertakings are so multiplied and on such an extensive scale as to diminish the rate of profit to an extreme low point: and it is now very doubtful whether employment can be found for the capital held by individuals with a prospect of fair profits. It may, therefore, be advisable at least to wait for more accurate and precise information than we yet possess as to the working of the commandite system in other countries where it is in operation. In the United States of America, where it has been carried to some extent, it may be expected to succeed better than in the old countries of Europe, because profits are higher, and the field for the employment of capital is there so rapidly extending. In the United States, however, as well as in France, doubts are entertained by very good judges, who are extensively connected in trade with those countries, as to the benefit derived from the system as it now exists, and the power of obtaining redress in the cases of fraud which frequently arise from it.

The Association for the Reform of the Law must especially feel how important it is that any new laws regarding trade and commerce should be so clear and reasonable as to protect effectually against fraud, and to facilitate a prompt and cheap settlement of disputes. These are at present settled by compromise or arbitration, in the mercantile community, to a much greater extent than would be the case, or would perhaps be desirable, if the decisions of our Law Courts could be obtained with more facility and economy; and we should be most careful to avoid any thing which would tend to increase expensive litigation, as well as to promote frauds.

If by any new law for promoting a new principle in partnerships generally, litigation in mercantile affairs should be increased, the Law Reform Society would deeply regret if the evil could in any way be attributed to their interference.

In the mercantile history of our country the Courts of Law were never so oppressed as they now are with the disputes arising out of our extravagant undertakings at home and abroad (surpassing the wild schemes of the Mississippi and South Sea bubbles). The trading community are very slowly recovering from the effects of these rash investments. We are informed of loud complaints made in France and America, but no adequate remedies are yet found for the regulation of commandite partnerships; and it would be extremely difficult to make a law to prevent the abuse of them, if tried in England.

The trade and commerce of Great Britain have gone on increasing, and have attained to their present state (surpassing in the magnitude and vast variety and extent of their operations those of any other nation), almost entirely under a system of private partnerships with unlimited responsibility. Even in the establishment of *joint-stock banks*, on the extensive scale which they have attained, the Legislature has not seen hitherto ground for altering this system. It would, therefore, no doubt require strong proof of the necessity of an alteration to induce it to interfere in promoting a system so foreign to our commercial as well as legal views and habits.

All classes in England are more trained to habits of business than in other countries. In municipal government, in the local administration of poor laws, and various other important affairs, — in an endless variety of institutions for which we are remarkable, — the people of all ranks are so much practised in self-government and the management of the most important concerns of social life, that they accomplish much more than in other countries, where the same affairs are managed by the central system of the general government, or by commandite partnerships.

From the great companies for insuring lives, for managing steam navigation, and conducting all kinds of banks, down to

the building and loan societies, and the conduct of a large portion of the multifarious mining operations of Great Britain, *individual talent and capital* provide ample means; and by their prudent but simple arrangements for guarding against ruinous losses, conduct the business with more economy, skill, and better results to the public welfare, as well as their own profit, than would arise from any system of legalised partnerships with limited responsibility that has ever been devised.

ART. VII.—THE STATE OF THE PROFESSION.

IF it be good in general to take note at times of our position, of our prospects, of the calamities that assail us, of internal discontents, of foreign threatenings, of the progress we have made, and of the changes which have come over the spirit of our existence,—imperceptibly indeed, but compared with our condition at remote periods, and at various stages in the interval, most marked and instructive,—it is not merely good that lawyers should do so, it is necessary: their rapidly increasing numbers, and the devices which the rest of mankind are falling upon to do without them¹, make it necessary that, even as enlightened craftsmen, they should look well at the present state of things; not merely for the sake of gain, fair or foul, but for the sake also of that honour and fair position which gives zest to their calling and makes them better able to serve their country in serving themselves.

We do not need evidence of ill-doing; internal jealousies, the constant accompaniment of such a state of things, are rife with us, which is shown in the struggle growing up, (we see no good reason for disguising it) between the two principal divisions of the Legal profession for position and profit,

¹ The numerous commissions and offices having judicial functions, which have been created during the last twenty years, in derogation of the common or general law, are testimonies of this not unnatural effort to dispense with old, effete, and inapplicable or unpliant institutions, and Sir Robert Peel's admirable suggestion for dealing with Irish affairs, another.

or, as the profane would say, for place and plunder. The Attornies desire to participate more largely in the dignity, the patronage, and the professional recognition which hitherto have been accorded to Barristers. The Barristers find not only these important matters but their very life blood, their revenues, without which neither life nor honour can live, in the world as at present constituted, encroached upon by the growing importance justified by the improved intelligence, activity, and respectability of the Attornies. As in most other cases, the battle-cry does not disclose the true nature of the conflict. The modesty of the combatants forbids an avowal of it, even if it have been so well considered as to be fully known, and it remains for some disinterested bystander to act the part of moderator or arbitrator, to show to each party the true nature of its position, and by his kind offices to reconcile their mutual interests, lest the public, whose servants they are, may, out of their quarrels, find cause to discard or to dishonour both.

It is proposed in the present paper to attempt this task : to probe the position of the profession of the law as a craft, — a truly honourable one, in the well doing of which the public have even a larger interest than its members; and to mark out the available foundations for its future settlement.

We must not suppose the case to be a peculiar one, either as to its causes or its consequences ; or that the remedies are peculiar. Illustrations of a similar state of things might be gathered from other professions and callings ; but to do the subject justice in that respect it would be necessary to draw too largely upon the pages of this Review. A glance must therefore suffice. We may say at once and briefly, that the condition of the profession is but a transcript of every other of the so-called learned ones : Law, Physic, and Divinity have fallen by their own weight. Their monopoly of professional importance has attracted too many competitors, and, like the *noblesse* of other countries, they starve on a diminished and too scanty patrimony.

The prominent difficulty in the case is the assumption of pre-eminent dignity on the part of the Bar, and the enjoyment in a more certain degree of the main sources of dignity, the money

returns, on the part of the Attornies. There can be no worldly dignity without revenues; and revenues in the possession of the well educated, the intelligent, the well-conducted patron, cannot be without much dignity, or what in the world passes for such. The problem is to abate somewhat of the assumption on the part of the Barristers without sacrificing the reality, and cordially to admit as fellows of the craft not the lower, but the more active members of the profession. If some energy, skill, and discretion be not directed to this end, the Bar will, as a body, soon occupy the same position as that of the House of Lords in relation to the House of Commons,—a result which will be as prejudicial to the public as it will be to both branches of the profession, and one therefore which we contemplate with dismay; but we state the matter thus plainly that others may look at it, as we for a long time have done, full in the face. The events of the last year have told us all, in many ways, that it is not by shutting our eyes to the fact that we can rob it of existence, but that we must seek to modify and regulate circumstances by timely statesmanship. Like the working of other problems of social life, the working of this must needs be slow, (perhaps slower than the emergency demands); for it would be as inconsistent with probability that all empty heads at the Bar should part at once or readily with their sole pretension, and inconsistent with all prudence that those members of the Attorney craft, who are scarcely recognised by their brethren as fellows, should be welcomed as fellows among the Bar, who, from higher education, and some other causes, have natural as well as professional claims to peculiar respect.

Let us mark the small changes which have of late taken place in the profession; and let us be assured they have some significance, although apparently trivial. The Judges have abandoned without, it is believed, any diminution of their personal importance, their ancient sign of dignity, the wig, when not on the immediate exercise of their office in Court; and the Bar no longer adheres to the decorous costume of black, which formerly was the *professional* garb, not to be thrown aside, except in the saturnalia of the vacation, when, as we recollect in our youthful days, it used to delight some

of our Queen's Counsel to don the attire of a country gentleman, "a bran blue coat with gilt buttons," yellow waistcoat, breeches of white corduroy, and top boots. The Bar no longer travel to the assizes in a chaise and four, but take their place in a railway train, with a peer on one side perhaps, and an attorney on the other.¹ But to speak of more solid matters. It is now some years since the *élite* of the Attornies took measures to secure the respectability of their profession, by requiring of its members a good professional education, which has already produced a very marked improvement among them; while, as we are all aware, the improvement of education generally, especially among the middle classes, has conferred upon the middle classes advantages which the public schools and universities have not always accorded to the higher classes. The natural boundaries of the two branches of our profession are therefore falling away, and if the division of labour is continued, it must be on principles founded upon what Mr. Square would call the nature and fitness of things. The Attorney is no longer (if he ever was) the creeping servile thing which it delighted the authors of older plays and novels, and some of their modern plagiarists, to describe the scrivener of former days to be. He holds up his head with the best, and bends it only in the courtesy which every gentleman will accord to others, according to the expectations which their station entitles them to entertain, or according to the better right which they acquire by their conduct.

The origin of the division of labour is to be traced to the necessity which once existed for providing for the lettered

¹ As a further illustration of this, we make the following extract from a daily newspaper of April last:—"Taunton, April 2. Lord Denman did not arrive by the train in which he was expected, and having intimated that he would dispense with the attendance of the javelin men, no preparation was made for his reception. When his Lordship arrived at the station, he entered a fly, and directed the driver to take him to the Castle; the driver happening to come from an hotel of that name, drove him to Giles's. 'This is not the place,' cried his Lordship. The driver turned his horse's head, and drove to Patterson's Castle Hotel, and then discovered, for the first time, that the gentleman whom he had inside was the Lord Chief Justice of England, and that his destination was the judges' lodgings at the castle at Taunton."

part of the profession when literature, or the power of reading and intellectual acquirements, were rare. The Attorney of the early period probably held pretty much the same relation to the Barrister, as the managing clerk of an Attorney does now to his master. In Scotland, at this day, the valuable office of writer to the signet may be acquired by being clerk to an advocate.

When the necessity which first established this division ceased, convenience recommended its continuance. The more practical or mechanical duties requires, not so much a different order, as a different kind of mind, from that which the theoretical or intellectual requires. And it is not only a different kind of mind which is requisite, but a different kind of habit. In one it must be reflective or speculative, in the other active or practical. This division is clearly becoming less and less necessary. General education confers correct habits of thought and ready apprehension, which go a great way to make a good lawyer. It is not difficult to superadd the technical knowledge, which, in spite of many hindrances, is rapidly becoming more simple and manageable, besides which, (in its present state), it is more easily learnt and impressed on the mind by practice than by reading, so that the practitioner has less and less need of his intellectual aid, the Barrister or Advocate. Indeed, a well organised office can to a very great extent dispense with the services of the Bar, except for those matters in which the presence or the signature of the Advocate is required, or for matters of rare occurrence. The addition of one or two intelligent young men of speculative, reflective minds, in short, of those qualities which go to make good chamber counsel, in addition to those more active men of active habits, which go to make the good practitioner, will serve his purpose, unless he require to relieve himself from responsibility by obtaining the opinion of counsel, as a special justification for his client. In the great offices especially, the division of labour that obtains among the partners and principal managing clerks, to whom considerable salaries are often given, enables the practitioner to accomplish the entire range of legal business.

On the whole, we regard it more as a question of interest to the Barrister than to the Attorney, whether the duties of the two branches, as at present conducted, should be mingled. In most professions and businesses the majority of those who have realised fortunes will be found to have derived their gains in no inconsiderable measure from participating in the profits of the routine or mechanical parts of it; of the constant as distinguished from the exceptional or the occasional. Men of good fortune, or of moderate competence, who can afford to wait, do not feel the difficulties of the case further than that from insufficient occupation their faculties are permitted to rust, and more energetic people pass them. Men of commanding abilities, with opportunities of display, feel it somewhat less, and thrive here as they would thrive any where. But the majority of professional persons, not cleverer than their compeers, in these clever days, feel it wofully. It is said that a high legal personage observed, in reference to the number of candidates for the office of judge in the new county courts, that nothing gave him so much pain as to find how poor, in pecuniary circumstances, the Bar was as a body. We have, in fact, obtained by means of civilisation such facilities, that the mediocre man has almost as much chance of success as the man of ability, while the best that the latter could do is now vastly diminished by the numbers who share the small, but constant gains of common-place work. The great Attornies also feel this in some degree, which is one cause of their competition for the work of the Bar. Every person has some relative an attorney, and withdraws his business to give him a chance. The effect is that the arrangements which enabled the man of business to do his business well are deteriorated, especially as the law of partnership forbids such arrangements as would make the payments of his inferior coadjutors contingent on the results of his balance sheet.

In the meantime the relations between the Barrister and the Attorney are becoming yearly more uncertain. A practice of trusting attornies has had its consequence; the occasional loss of fees more or less considerable in amount, by which the barrister is robbed of his (often inadequate) recom-

pence through the agency of the middleman. The honorarium becomes a mercenarium, affected by the uncertainties of the pecuniary means or credit of the attorney, and perhaps by the insolvency of the client, without the opportunity of balancing loss by countervailing profit elsewhere. The fee book in such case is not, according to the received notion, a journal of realised effects, but a ledger of debts and credits like that of the merchant.

To what degree this practice has obtained it is not possible to determine, but it is believed that it prevails too extensively for the well-doing of the Bar.¹

But what of all this? it will be asked. Our answer is, that we are standing upon old land-marks, where the foundations have been undermined, or where the sea has gained ground upon us on every side; and if we stand higgling or wrangling about the respective dignities and position as by usage established of the different branches of the profession, without looking at those causes which have affected all pro-

¹ In a pleasing book recently published, the system is spoken of as if the writer really knew nothing of what was actually passing in the profession. In a chapter on the Honorarium, it is said with all gravity, "From the very earliest times, and in every country where advocacy has been known, it has been the custom to look upon the exertions of the advocate as given gratuitously, and the reward which the client bestows as purely honorary, in discharge not of legal obligation, but a mere debt of gratitude. There can be little doubt that this notion has been encouraged and kept up from a jealous apprehension lest the profession should degenerate into a mean and mercenary calling; for there is one peculiarity which distinguishes it from all others, and that is the disfavour with which men regard a presumed readiness to espouse and support by argument either side of a question. This is a circumstance so repugnant to the ordinary sense of duty, and apparently so subversive of the distinction between right and wrong, that there has been always felt an unwillingness to admit that a man is entitled to barter the powers of his intellect for money indifferently in the cause of virtue and vice."—Hortensius, or the Advocate, by W. Forsyth, Esq., p. 410. We hope to return to this amusing work very speedily.

With respect to the subject of the system of credit given by the Bar, we do not hesitate to say that it must speedily be attended to, or some very rough remedy will be taken. Is this not a proper matter for the two respectable attorneys' societies, the Incorporated Law Society and the Metropolitan and Provincial Societies, to attend to? We know enough of the feelings of a portion of the junior bar to enable us to predict, that unless some proper step be taken towards its adjustment, a serious and awkward "disruption" may take place. For the present we say no more on this part of the subject. — Ea.

fessions alike, and without considering how we may reconcile ourselves to the public and to one another, by making the profession as useful as possible,—as little burdensome, and as little dilatory, and withal, in a fair commercial spirit, as profitable as possible, (which, as it is a practical absurdity to repudiate, it were more wise to cultivate in an honourable manner,) we may bid farewell to the glories of the profession, and be content to talk of them over a cheerless fire-side, which many poor fellows are obliged to do, as things unattainable or past.

Bad as is the present aspect of the case, limited to the points of view in which it has been commonly regarded, and in which, for that reason, we have so regarded it in the foregoing remarks, we do not see any just cause for despair; but on the contrary we believe that if the members of the Bar would cast aside petty jealousies of their fellows of the same degree, earnestly consider what is necessary to make the profession, in a far greater degree than it now is, an intellectual and honourable calling, worthy of men of genius and science, and frankly admit the members of the other branch to the status which they have won by their intelligence and by their efforts to elevate the character of their fellows, the task would not be difficult. Let the right spirit be evoked, and we doubt not that the force of opinion will have its usual results.

For our own part,¹ we think that the course lies direct through Law Reform. If you will, Law Reform dictated by a conscientious desire to make law what it ought to be, at whatever immediate cost to ourselves; but if you will not, then Law Reform prompted by sheer self-interest. It matters not, for we sincerely believe that the interests of the public and the interests of the law craftsmen are entirely identical,—not in the long run merely, but day by day, and every day; that is, if we are wise enough to regard law in its *administrative and preventive* character, as well as in its *litigating or retributive* character. Both are to be regarded alike; the *former* saves honest and prudent people and their families from the consequences of inadvertence, or worse; the *latter*, which will ever be wanting as long as men live, —

for questions must needs come were the law ever so perfect;— is not so much the offspring of imperfect legislation as of the play of human interests and passions; and the point to be aimed at is, to find a solution of these questions as early as possible and with as little additional provocation to fresh passion and difficulty as we may. Nothing is so fine as the spectacle of an honourable lawyer moderating the conflict of the litigants, inciting their return to good feeling, and by skilful advocacy working out the results even with the acquiescence of those who met at first in rancour; advancing justice on the one hand, and preventing the total overthrow of the defeated (if haply he must be defeated), on the other. It is less common than it used to be to see quibbles advanced now; the Bench and the Bar discountenance them, unless the substantial merits of the case are with the quibbler, and there is no escape, but through his technical points.

Our space warns us that we must not dwell on the remedies at any length; nor, if we were differently circumstanced, should we think it prudent to do so till the right spirit had been ripened into a common purpose by discussion, and by the full recognition of the true position, which discussion must produce.

We will run rapidly over our list,—prepared, if need be, on a future occasion to enter into the vindication of each, and to manifest what contribution each is capable of rendering to the general object.

We will say nothing of a Minister of Justice, or of a Law University, or of a better manner of publishing Law Literature, which have been mentioned and discussed on other occasions; all powerful and necessary means for the entire and permanent well-doing of the profession. Our immediate remedy would be the union of the two branches of the profession, without destroying any present institution, or altering, at present, the status of either branch.¹ Let a

¹ Most reflecting persons will agree with the writer of this article in the statement of grievances. Perhaps the proposed remedies will be open to more doubt, but we do not hesitate to give them, because even if they are not the right ones, they very probably may lead to their discovery. We may mention that the establishment of a Faculty of Law has been recently mooted in a very distinguished quarter. — *Ed.*

Law Club or society be established, into which should be admitted all Judges, Benchers, Queen's Counsel, Serjeants, Judges of County Courts, Police Magistrates, official Lawyers, Members of the London Law Societies, Clerks of the Courts, principal officers of the Superior Courts, and afterwards let members, of whatever rank or degree, be admitted by ballot.

The point of union would be, by well organizing the society as a species of legal aid and assurance, to have a complete library, and to afford other means of giving readily to members any information which they may require for their professional or official occasions.

Every member should, if possible, be an officer, charged with some division of duty, in that wide and trackless field — our law as it is now — so as to give him a natural and ordinary means of intercourse with his fellows, and at the same time afford the best chance of leaving no point unprovided for. Taste, or occupation, or previous pursuits, would dictate the part which each would seek.

To the library might be added readings of new statutes, and the most important decisions with discussions thereon, after the manner of our literary societies, with a view to obviate the difficulty that most men in practice find in keeping pace with the changes in the law by legislation.

A school consisting of the pupils and clerks of the members of the profession would give occasion for and constancy to these demonstrations, and, by employing the scholars in the collection and preparation of the material, and in the labours of the library, indirectly afford assistance to those members of the profession whose time and attention are already occupied with the labours and cares of business; and to whom the scholars stand in the relation of junior assistants, pupils, or clerks, while the scholars, thus practically engaged, would acquire more clear, distinct, and definite views than are to be derived from the dogmatic form of teaching, or the looser commentary or lecture.

Joint committees of both houses, or, to speak more literally, of both branches of the profession, might consider projects of amendment. Of the practicability, utility, and convenience

of such a combination, we have a type in the Law Amendment Society, which numbers amongst its members not only lawyers of each branch, but of each part of the kingdom, and, besides that, legislators of both houses, and merchants and men of business. Whether the club should admit laymen of the same kind to a limited extent, and under conditions, would with many be a doubtful question, as involving the disclosure of the mysteries of the craft. We should incline to the franker course, by which we feel assured not only much valuable aid and intelligence would be obtained, but more assured recognition and support among the other classes of the people, and by the legislature of the country. We should hope to see the Law Amendment Society swallowed up and its exertions continued in an institution of this comprehensive character.

The next point would be to establish a court of honour, or court legal, answering to the court martial, for adjudicating upon cases of alleged misconduct, with power to inflict the penalty of disbarring, striking off the rolls, disqualifying for office, or censure, subject to appeal to the Courts.

Perhaps, however, incidental to this, or independent of it, there should exist some administrative body to settle all points of practice relative to fees, such as that of retainers, which has lately been under discussion,—a sort of mixed tribunal, consisting not of solicitors only, but of judges, barristers, and solicitors; a certain number of county court judges, and others removed from actual practice—forming a comparatively disinterested body,—might form a part of it as a quorum. The retired judges might be induced to take part.

Having provided for the due representation of the law in Parliament with an appropriate administrative and judicial body for the management of its internal interests, for the instruction of its members on new laws and new practices, for recording and promulgating decisions,—needful incidents to instruction,—and for affording to its members mutual aid in their professional business, the profession would recover, to as full extent as ever, the unity, dignity, and importance which it has not now in so great a degree as even its most *apathetic* friends could desire.

We should, however, be inclined to add other recommendations calculated, we think, to bring the two branches of the profession into harmony, and add to the efficiency of both as instruments for the conservation of justice and the protection of the public. They are

To allow the barrister to disbar himself, and become an attorney on certain conditions, but without forfeiting the status which he enjoyed as a barrister.

To allow the attorney to put off his attorneyship, and become a barrister on being examined for the Bar without so long an interval of pupillage which is absurd in the case of accomplished men of mature life, of established respectability and well ascertained experience and intelligence.

To allow a person who has gone through the ordeal and preparation for both branches,—say five years for an attorney and three years for a barrister,—according to the usual course of clerkship and pupillage, and passed examinations for both, to practise both as attorney and barrister.

To require all practitioners, whether attorneys or barristers, to attend as medical men do a certain course of readings and demonstrations, and to undergo certain examinations and attend certain meetings.

To authorise the judges to assign to every court of judicature for which there is not a regular attendance of the Bar a sufficient number of barristers to act as advocates, so that no court shall be unsupplied, and the suitor and the court may have always constant assistance of that nature. The charge to be defrayed by a stipend payable out of the suitors' and other funds, such as the stamps on the admission of barristers and indentures of clerkship, and on attorneys' certificates.

In order to create an effectual barrier against improper and incompetent persons, to make the examinations coextensive with the range of law and of a most effective character, and to spread them over the period of clerkship and pupillage.

It is moreover desirable that the system of standing counsel, as well as standing solicitors for bodies of persons, should be extended and encouraged.

The departments of government have each their counsel appointed by the Attorney-General; and the practice is of

great value. Without the experience of some years it is scarcely possible to advise with promptitude and convenient certainty upon complicated matters of administration.

If the principle were developed in various directions, the field of employment for the Bar would be extended with proportionate advantage to the public. We do not see why there should not be an association of trustees, with standing counsel and solicitors for mutual aid and protection; why public officers should not fortify themselves in a similar manner; why magistrates and justices of the peace, and authorities of other kinds, should not attempt to counteract the dangers to which they are exposed by habitually employing the same legal advisers, making it worth their while to supply themselves with the whole armoury of statute law and cases, and to become masters of the art of attack and defence in their own proper department. Justice would not fail so frequently, and the public, which might do the like, would suffer no wrong.

Such an arrangement would not interfere with men of general practice as counsel or solicitors, while it would furnish them with complete aid on special emergencies. The division of labour would bring back the professional giants of other days.

Legislation affords a wide field most grievously neglected. Not that a large amount of treasure is not expended upon it; — it is expended so wastefully, with so little design and to so little purpose, that it is almost profitless of good, and seldom fails to affect injuriously the reputation and well-doing of the employed. We must not trust ourselves to dwell upon this topic. If a body of the practitioners were withdrawn from practice, and their services were applied in consolidating the law, aiding in legislation and supplying the courts with digests of the law upon important cases as they arose, the springs of legal industry would be relieved (as financial reformers phrase it), the opposition to Law Reform would be counterbalanced by an equal force of advocates and efficient allies, and the country gain largely by its amendment.

The Superior Courts should be relieved by the establishment of sundry special courts for matters of a special nature,

with omniscient local courts scattered over the country. With subsidiary courts for special matters, and with superior courts of appeal from all, the field of employment would be extended, returns would be quickened, delay would be prevented, certainty would be induced, and expense would be diminished. Few know how much courts of inferior or special jurisdiction are paralysed by the delays of the court of Queen's Bench. If there were a court of prerogative jurisdiction, sitting, as the Court of Chancery does, from day to day throughout the year, the local and other special courts would gain immeasurably in force. The taking away the certiorari in so many statutes is the oddest sort of mending of the blunders of inferior tribunals. In the hope of preventing delay and litigation, it has substituted oppression and injustice. Better quicken the tribunal of appeal than deprive the public of its protection.

We would complete and render efficient every judicial establishment, and at the same time subject it to appropriate responsibility. A good judge rejoices in the advantages of a court of appeal. His jurisdiction gains force by the respect accorded to a court which has few decisions reversed. He is apt to indulge less in hesitation and vacillation. He knows that an error, the effect of prompt decisions, is susceptible of remedy. He thinks boldly, decides promptly, and courage and skill are the results.

We know not why the Bar, already dignified by a bench of judges unequalled in the world for vigour and talent, not to say sometimes for genius, should not, by means of an order of judges-advocate or judges-assistant, provide more amply for the discharge of judicial functions which are clogged so unworthily with drudgery and technical detail. A commission of inquiry into the office and duties of a judge of the superior courts of law would tell a tale of extravagant parsimony of which the world has no account. We blame unjustly the judges for their resistance to reforms of which their daily routine forbids them to take thought, and perhaps not more unjustly for those escapades into which they are apt to indulge at the miscarriages of the Legislature to which

they do not, because probably they cannot, lend their aid.¹ A judge sometimes reminds us of a high-mettled hunter, put in his elder days to do inferior work at which he would have spurned in younger life. Should it be so?

In conclusion, we would urge that it is our duty first to look at the work to be performed, and for whom,—at the agenda of our masters the public. Let us consider that the first business of a legal system is the recordation of legal acts and events, now performed to so limited an extent by the conveyancers, &c.; our second, the protection of the absent and the incapacitated; our third, the audit, authentication, and enforcement of contracts and other claims; our fourth, the settlement of disputes and differences; our fifth, the correction and punishment of irregularities and offences.

Every local court should have full jurisdiction to dispose of all such matters. It should be charged with every class of business. But then it should be complete in all its appointments: fully organised and in constant action. No court should be allowed to exist without being fully manned.

Again; the practice and procedure of all courts should be made uniform in essentials: in the purposes and in the course and method; but not in times, seasons, and intervals which must be dependent upon the character, whether stationary or ambulatory, and the fluctuations of business.

All detailed litigation should be done by special courts, subsidiary to, and under the immediate controul of, the chief court.

Remuneration is a matter of difficulty in every profession—in all the walks of life, except that of the tradesman, who takes it in the form of profit on the sales. Intellectual exertion does not admit of such precise computation. The toil of preparation which has occupied half a life is seldom considered in the result—the exertion of a day or a week. By creating an order of teachers, of professors, of writers (after a different kind), of reporters, of secondary judges, of practical legis-

¹ It has been pointedly said by one of the present Equity Judges, that in a perfect system of equity jurisprudence, so far as the judicial power goes, there should always be one judge playing at cricket. — Ed.

lators, of official lawyers, all acting in immediate communication, there would be employment and emolument for much larger numbers, and the remuneration at present received would be less disproportionate. Authorship alone, systematically conducted, would furnish better results, if somewhat better regulated: not, as with our legal author class now, as soon as one bookseller announces a work, at the bidding of another bookseller start one of the same kind, without distinction of purpose or merit. Would that men, rivalling the single-speech Hamilton, would make it their ambition to write the best work in the smallest compass, a classic in style and spirit, an Elzevir in size; and in like manner would that each lawyer seek to establish his reputation and embalm his name in a work of true originality, not differing in fantastic style, but in subject untouched, profoundly thought out, and viewed from points of view in which the subject has not been hitherto regarded. A new route selected, not merely because it is new, but because it presents a field of service yet untrodden. Let the view be single, not encyclopædial. In short, after that manner which we presumed to suggest in a late number of this Review.

The critic rarely conforms to his own rules. We counsel singleness, and have uttered a code of suggestions. There are, however, occasions in which it is proper to enlarge. The present is one. We wish to induce our fellows of high and low degree not to exhaust themselves in a wrangle upon one or two points — not to exhibit the unusual example of the lawyers taking the shells and losing the oyster. It is all moonshine to affect to despise filthy lucre. There is no barrister worth anything who does not relish the chink of his fee. It is the salt wherewithal his labour is made savoury. He is an hireling; let him be an honest one; let him do his work bravely, with the energy and skill of a master; and, if he will, as we would, let him seek to be sought for his excellent acquirements, and by that confidence which even a frank and manly servitude ever wins. We nauseate that delicacy, that prudery which ever talks of honour and thinks of fees. The best men think of the one not too highly nor

too indifferently; and they talk not of it, but act the other. This may be excused in young dandies fresh from college, who have not yet measured their stature with the world. They are not models for the time that now is, and will be; and the sooner we all shake hands with good work-a-day people, the more likely are we to retain a position which it will require no small prowess to hold.

We have said all that is permitted to us on this occasion. We will at no distant period renew the parley upon some of those points which are too slightly indicated. In the mean time we trust that we shall induce many intelligent sufferers in the profession to think out the subject.

ART. VIII. — BANKRUPT LAW CONSOLIDATION BILL.

THIS bill has been amended by the select committee to whom it was referred, and we believe has now, in its amended shape, the concurrence of the Lord Chancellor, and will consequently, in all probability, shortly become Law.

Lord Brougham found the Chancellor differed with him on several of the propositions in his original measure. He found him opposed, 1st, to the title of *Judge*; 2nd, to the proposed Court of Appeal; and 3rd, to the very important chapter whereby it was proposed, to give to the Court of Bankruptcy a jurisdiction to distribute the estates of deceased debtors, whether traders or non-traders. It consequently became necessary for his Lordship to consider whether he would insist on these matters, whether he would debate them in committee of the whole House, or at once yield to the wishes of the Chancellor, and thereby ensure the other parts of his measure, as to which, substantially, the Chancellor and he are agreed; and, under all the circumstances, we are of opinion his Lordship has done wisely in adopting the latter course.

The two first points on which the Chancellor was opposed to Lord Brougham were matters of very little moment; the *first* (the title of *Judge*) of absolutely *none*; and the *second* (the proposed Court of Appeal) was a proposition, the pro-

priety and expediency of which, at least, might very well be questioned, seeing the conflict of evidence on the subject, and the very trifling number of the appeals from decisions of the commissioners. The *third* (the chapter relating to the distribution of the estates of deceased debtors) was a matter of much importance, and, to a considerable extent, supported by the evidence taken before the select committee. But here also, as we have already said, we consider Lord Brougham to have done well in giving way, more particularly, as regarding this, it is understood his Lordship has obtained from the Chancellor the promise of some mode of facilitating creditors' suits, retaining the jurisdiction in the Court of Chancery.

Lord Brougham's amended bill still contains much that is very desirable, and greatly needed; indeed the Consolidation of the different Statutes relating to Bankruptcy would alone render it a most important measure. As the bill stands, it amends, methodises, and consolidates those statutes — it provides for the reduction of the number of London commissioners from six to four, thereby effecting a considerable saving — it gives to the commissioners original jurisdiction in all matters in bankruptcy — it abolishes the fiat, and introduces a more simple mode of procedure — it gives a power to examine trader debtors on summons — it simplifies the present acts of bankruptcy, and creates additional ones — it more effectually protects creditors against fraudulent preferences and secret transfers, protecting at the same time all *bonâ fide* transactions — it affords increased facilities for arrangements between debtors and creditors, extending them to *traders*, this privilege having heretofore been confined to *non-traders* — and it confers a penal jurisdiction for certain specified commercial offences; and, with respect to others, gives the court power to order payment of the costs of prosecutions out of a certain fund. These are the more important parts of the measure, and several of them were proposed in a bill introduced by his Lordship in March, 1847. By substituting a petition to the court in lieu of the fiat now issued by the Lord Chancellor, and giving to the commissioners original jurisdiction in all matters, much useless delay and unnecessary expense is got rid of. We have efficient commissioners — men uni-

versally respected, and in every way competent to the discharge of their duties — men enjoying the confidence and respect of the commercial community, and engaged daily in the administration of the Bankrupt Laws, and daily dealing with and deciding questions of immense magnitude, and yet, constituted as the Bankruptcy Courts at present are, there are matters, trifling in importance, and, in many cases, of mere form, on which they have no power to decide, and as to which the suitor is compelled to go to the new substitute for the Court of Review — namely, to the Vice-Chancellor appointed to sit in Bankruptcy. This, also, was a matter proposed to be remedied by Lord Brougham's bill of March, 1847; but his Lordship then only accomplished the transfer of the insolvent jurisdiction to the Insolvent Debtor's Court and the County Courts, the abolishing of the circuits of the Insolvent Court Commissioners, and the reduction of certain of the commissionerships in both courts. What we have been stating, however, is very absurd. But the *absurdity* of it is the least part of the affair — the *expense* is a serious grievance, as may be shown in a few words. Take, for instance, the case of an application by a mortgagee for leave to bid at the sale of the mortgaged property. This is a matter of mere form, and would be decided by the commissioner, acting in the bankruptcy, in five minutes. But the commissioner has no power to do this; the mortgagee must apply to the Vice-Chancellor; he must prepare and file his petition; must make and file an affidavit or affidavits in support of it; must serve the assignees; and he must instruct counsel. The matter then comes on for hearing: it is unopposed; but the assignees of the bankrupt's estate must, nevertheless, appear also — must also instruct counsel; and this farce, and others of a still more ridiculous nature, are daily being gone through; and such was latterly, for the most part, the business of the Court of Review, and is now the sort of bankruptcy business transferred to, and decided on by, his Honor Vice-Chancellor Knight Bruce. The *appeal* business — the business which alone ought to come before the Vice-Chancellor sitting in Bankruptcy — amounts to next to nothing¹,

¹ Return made to the House of Lords, for the five years ending 11th November 1847, shows the average number of appeals.

—from all the commissioners, town and country, to be under fifteen a year.

Another example, of a kind similar to the one just given, is the application by a bankrupt trustee to prove against his own estate — another, that of an equitable mortgagee to be proved such, and to have his account taken. The commissioners have no power: the bankrupt, or mortgagee, must go to the Vice-Chancellor. And a rather striking illustration of the absurdity of all this happened not long ago. The mortgage was one of leasehold premises, the rent under 100*l*. The mortgagee had to present his petition to the Court of Review, to support it by affidavit, to instruct counsel, &c., all in the manner already described. The petition came on to be heard — the assignees did not oppose — they instructed counsel to appear, and consent to any order the court might think fit to make — and the Chief Judge, being well advised, made the common order, finding the petitioner an equitable mortgagee, and referring the matter to the commissioner acting in the bankruptcy to take the account. A more complete farce cannot be conceived. But the costs to the parties exceeded 20*l*., and the property was subjected to an additional quarter's rent from the delay consequent on the application; and the real work — the taking the account — came back after all to the commissioner. In the same bankruptcy the solicitor for a *legal* mortgagee (with which, strange to say, the commissioner is entrusted with power) made an application to the commissioner (Commissioner Goulburn) to take his account, and make an order for sale. The amount was 2000*l*. — the account was taken, an order made directing the sale, and the matter completed, in less than half an hour, at an expense under 3*l*.!

But the very first proceeding in bankruptcy — the *fiat* — is an anomaly. At present, before a petitioning creditor, or a trader desirous of making himself bankrupt, and delivering up his estate to be divided among his creditors, can proceed a single step in the Court of Bankruptcy (a court, by the way, instituted for the very purpose of hearing such matters), he must first go to the Lord Chancellor, and obtain what is called a fiat, to enable him to prosecute his complaint, which

is issued as a matter of course, and altogether unnecessary ; and which, having been reported against by the Commissioners of Inquiry of 1840, ought long ago to have been abolished. It is useless, and attended with unnecessary trouble, expense, and delay ; and after all, if, when the fiat is obtained, there should, from any accident, happen to be an error in it — an error of even the most trifling nature — all the proceedings are stopped. The commissioner has no power to correct it — he cannot go on. The petitioning creditor, or trader, must go to the Vice-Chancellor — must instruct counsel — obtain an order to amend his fiat — and must get that order confirmed by the Lord Chancellor — and the amendment is only made on filing what are called fresh docket papers (a new affidavit and petition), the estate being in the meanwhile endangered and liable to be swept away by judgment creditors — perhaps on proceedings under a fraudulent bill of sale.

It has been said by certain opposers of Lord Brougham's measure, that the proposal to give to the Court of Bankruptcy a power of imprisonment as a punishment for certain specified commercial offences, in the manner done by the Bill, is in effect an abolition of trial by jury. This is a great mistake. Chapter 10. — the chapter treating of offences against the law relating to bankruptcy — leaves the punishment of matters deemed felony and misdemeanour, and also of perjury, exactly as it now stands, (see articles 314, 315, 316, and 317); and, although articles 319 and 320 give to the court a direct power to punish by imprisonment for certain offences therein specified, this cannot be said to interfere with trial by jury ; and those who allege that it does, altogether forget both the present state of the law in this respect, and the imperfections in it which the articles are intended, and in our opinion are well calculated, to remedy. This will appear by an examination of these articles.

We certainly confess ourselves unable to discover in these any cause for alarm. On the contrary, we think they will work well — will ensure the punishment of the offences specified (which the law, as it at present stands, does not), and that the knowledge of their existence will alone operate to prevent the necessity for a resort to them. They are not

to take effect "until after the expiration of six months from the commencement of this act, — and then, only against such traders as shall have been adjudged bankrupt on petitions for adjudication under this act,— and for offences committed after the commencement of this act."

Surely this is a great improvement in the present state of things. As the law now stands, the court has no power to punish. It matters not of what the bankrupt may have been guilty. He may have bought goods of *A.*, and sold them next day to *B.* for half their cost; or he may have pawned them, and disposed of the money so obtained, in any conceivable manner; he may have done all this in a hopeless state of insolvency, or in contemplation of bankruptcy; or he may have committed any, or all, of the acts specified in articles 319 and 320: it signifies nothing if he makes *true discovery*, the court has no power to touch him. It may refuse, or suspend, the bankrupt's certificate, and withhold protection, and any judgment creditor who has not proved may take and imprison him. But the imprisonment is not for the offence or offences of which the bankrupt has been proved to have been guilty; it is for non-payment of the imprisoning creditor's debt — a debt which the bankrupt, if he has made true discovery, can have no possible means of paying. The thing, if done at all, is done in a round-about, and a clumsy and inconsistent, and, we will add, in a most undignified manner. A bankrupt *may* thus be punished; but if he be, the punishment is effected in a way by no means likely to operate to a sounder state of things, or to be commensurate to the offence; it is unseemly and, above all, it is *uncertain*, and may be altogether evaded.

The opposers of articles 319 and 320 desire a continuance of the present system, with this difference, viz. that all creditors who have proved under the bankruptcy shall be deemed judgment creditors and entitled to have a *Capias ad satisfaciendum* on a certificate from the court that they have so proved, and that they shall, on the adjournment of a bankrupt *sine die*, or on the refusal or suspension of his certificate, be entitled to take and imprison him on such *Capias*. But where, we would ask, is the security that any such *Capias* would be put in force, and what the manifest and all but avowed object? We know, or at least have a strong suspi-

cion of what would follow. We fancy we are not very wide of the mark in supposing that every creditor would do just that which was most likely to put something into his own pocket. We imagine he would use his *Capias*, not with a view to punishment for the commission of a commercial offence, but as a means of screwing something out of the bankrupt or his friends—leaving utterly out of view all considerations of public policy. This is what assuredly would happen. And as to the “abolition of trial by jury,” where is it now—and where would it be under the system propounded by the opposers of the articles we have quoted? There is none, and would be none. The creditor takes the unprotected or uncertificated bankrupt, and imprisons him; and he may keep him in prison for just the same period as it is proposed by Lord Brougham’s bill, that the court shall have power to imprison him; but in either way there is no trial by jury. The one is, as we have already said, a round-about, clumsy, inconsistent, and most undignified proceeding; the other, a direct mode of punishing for a particular and a specified offence, and one likely, we firmly believe, to place trading and commercial dealings on a sounder footing, and we consequently sincerely desire that it may meet with the success which we think it merits.

The saving by the bill and the fees abolished are as follows:—

Saving.

Two London Commissioners, abolished as vacancies occur, 2000 <i>l.</i>	
each	- £4000
Secretary of Bankruptcy	- 1500
One Registrarship, the office held by Mr. Ayrton at the time of his promotion, never filled up, and now abolished	- 1200
Three London Registrars abolished—Mr. Serjeant Lawes retiring now, and two abolished as commissionerships become vacant. See Articles 37. and 39.	- 3000
Clerk of Enrolments, and his clerk, abolished	- 1000
Registrar of meetings, abolished	- 800
Two clerks in chief Registrar’s office, abolished	- 400
Ushers and Remembrancer of Court of Review, abolished	- 350
Two London ushers, abolished as commissionerships become vacant	- 200
Accountant’s office, clerks abolished	- 500

£12,950

Deduct Increase in Salaries.

			Brought forward	£12,950
Chief Commissioner	-	-	-	£500
Chief Registrar	-	-	-	300
Senior Registrar	-	-	-	250
Taxing Master	-	-	-	300
Country Registrars, 100 <i>l.</i> each	-	-	-	1200
Usher of Chief Commissioner	-	-	-	20
Country ushers, 10 <i>l.</i> each	-	-	-	120
Housekeeper	-	-	-	100
				<hr/> 2790

Ultimate annual Saving - - £10,160

Fees Abolished.

Docket struck, and not acted on	-	-	-	£1 12 6
Renewed fiat	-	-	-	0 12 0
Auxiliary fiat	-	-	-	0 12 0
Certified copy, declaration of insolvency	-	-	-	0 2 6
Certificate to authorise advertisement in Gazette	-	-	-	0 2 6
Filing affidavits and other documents	-	-	-	0 1 0
Filing fiat	-	-	-	0 1 0
Search warrant	-	-	-	0 5 0
Swearing affidavit	-	-	-	0 1 6
Order made in any matter heretofore within the jurisdiction of the Court of Review	-	-	-	1 0 0
Minute of order	-	-	-	0 2 6
Certificate of bankrupt's conformity	-	-	-	0 6 6
For entering every matter for hearing in a subdivision court	-	-	-	0 1 0
Order of subdivision court	-	-	-	0 5 0
Trial of issue	-	-	-	2 0 0
Subpoena ad rectificandum, or other writ	-	-	-	0 2 0
Fee on every sitting of the court	-	-	-	0 10 0

The 20*l.* and 10*l.* fees, now payable by the official assignee out of the first moneys coming into his hands, are also proposed to be abolished, and a per centage is to be levied in lieu of them, which it is understood will not exceed 3½ per cent. on the gross receipts.

We cannot close this brief notice of this most important bill without expressing our deep sense of the renewed obligations under which Lord Brougham has laid the profession and the public by the great pains he has bestowed on it, and of the unwearied patience he has shown not only in listening to all persons entitled to give an opinion as to its provisions, but in seeking most diligently all such opinions wherever he

thought they were likely to be of any use in perfecting the measure. He has been repaid for all this labour by producing an admirable commercial code of law, which will be an enduring monument to his fame.

ART. IX.—REGISTRY AND TRANSFER OF LAND—
MR. DRUMMOND'S BILL.

1. *A Bill to facilitate the Transfer of Land.* Ordered by the House of Commons to be printed on the 14th day of February, 1849.
2. *Substance of the Speech of Henry Drummond, Esq., M.P., in the House of Commons, on Wednesday, March 7., on the Second Reading of the Transfer of Real Property Bill.* London, T. Bosworth, 215, Regent Street, 1849.
3. *Thoughts on the Registration of the Title to Land, with Observations on Mr. Drummond's Bill.* By EDWARD VANSITTART NEALE, Esq. London, Stevens and Norton, and Ridgway. 1849.
4. *Democracy in France.* By Monsieur GUIZOT. Fifth edition. Murray, 1849.

IN the month of May, 1834, just about fifteen years ago, a bill for the Registry of Deeds, founded on a Report unanimously agreed to by the Real Property Commissioners, and drawn by them with the most elaborate care and after enormous labour, (some of the most learned and eminent men of the day), supported by a Report of a Select Committee of the House of Commons, moved by a brother of the existing Lord Chancellor, and countenanced by one of the most powerful Ministries that ever commanded a majority of the House of Commons (the Parliament being that first returned after the passing of the Reform Bill,)—this Bill, we say, so prepared and so supported, was thrown out in a House of 205 members, 161 members voting against it, and only *forty-four* for it. But this was not all; the majority against it had increased. It had been several times pre-

viously rejected, it is true, but this last defeat was by far the most deplorable and complete. In the preceding session the numbers were, for the second reading of the Bill 64, against it 82, majority only 13; so that the sentence passed upon it in 1834 (a most memorable year in the history of Law Reform) seemed almost conclusive against its success. But mark, how vain are all such judgments; as if to read a lesson to all supporters of a right cause to persevere and never to despair,—in 1849 a Bill for the establishment of a Registry is introduced into a House of Commons not remarkable for its reform tendencies, the provisions of which are pronounced by many to be crude and unintelligible, and certainly the result of the labour of one individual only, who had hardly been assisted by any one,—moved by a country gentleman who had been absent many years from Parliament,—which, so far from being either supported or drawn by the Real Property Commissioners, before whom the subject was pending, was made in the absence of their Report, and in the midst of rumours (true or false we know not) of their alleged difference of opinion on the subject—opposed by the Home Secretary, the Attorney and Solicitor General—who merely asked for delay—this last Bill, we say, under almost every disadvantage that could attend it, is read a second time by a majority of 10.¹ In 1834 county member after county member rises

¹ The names on the division will be interesting to some of our readers:—

AYES.

Arkwright, George	Gibson, Right Hon. Thomas Milner
Bailey, Joseph, Jun.	Goddard, Ambrose Lethbridge
Barrington, Viscount	Grenfell, Charles W.
Berkeley, C. L. Grenville	Gwyn, Howel
Brown, William	Harris, Richard
Burroughes, Henry N.	Headlam, Thomas Emerson
Buxton, Sir Edward North	Henry, Alexander
Cayley, Edward Stillingfleet	Heyworth, Lawrence
Christopher, Rob. Adam	Hood, Sir Alexander
Colebrooke, Sir Thomas Edward	Kershaw, James
Crawford, William Sharman	King, Hon. Peter John Locke
Ellis, John	Langston, James Haughton
Evans, William	Milner, William Mordaunt Edward
Fagan, William	Milnes, Richard Monckton

to oppose it; in 1849, the squires of all parties come to the rescue, and are ready to take it at all hazards. Who will say that this is not an extraordinary change of opinion, and who shall be able to show with certainty how it has been produced? The best mode of accounting for it is, that a principle, true in itself, must advance; that in the last fifteen

Mowatt, Francis
Muntz, George Frederick
O'Connor, Feargus
Ogle, Savile C. H.
Pechell, Captain
Pilkington, James
Pinney, William
Price, Sir Robert
Seropa, George Poulett
Seymer, Henry Ker
Sheridan, Richard Brinsley
Sibthorp, Colonel
Slaney, Robert Aglionby
Smith, Right Hon. R. Vernon

Sotheron, Thomas Henry Sutton
Stafford, Augustus
Stanton, William Henry
Stuart, Lord Dudley
Thicknesse, Ralph Anthony
Thompson, Colonel
Thornely, Thomas
Trelawny, John Salusbury
Verney, Sir Harry
Walmsley, Sir Joshua
Williams, John
Willoughby, Sir Henry
Wyvill, Marmaduke

Tellers for the Ayes, Mr. Henry Drummond and Mr. William Page Wood.

NOES.

Armstrong, Rob. Baynes
Arundel and Surrey, Earl of
Boldero, Henry George
Boyle, Hon. Colonel
Bremridge, Richard
Buck, Lewis W.
Campbell, Hon. William Frederick
Carew, William Henry Pole
Clive, Henry Bayley
Crowder, Richard Budden
Cubitt, William
Davie, Sir Henry R. Ferguson
Dawson, Hon. Thomas Vesey
Fordyce, Alexander Dingwall
Grey, Right Hon. Sir G.
Hawes, Benjamin
Henley, Joseph Warner
Hope, Sir John
Hotham, Lord
Howard, Philip Henry
Hughes, William Bulkeley
Jervis, Sir John
Lockhart, William

Mackenzie, W. Forbes
Maitland, Thomas
Morison, Sir William
Mulgrave, Earl of
Mullings, Joseph Randolph
Packer, Charles William
Paget, Lord George
Palmer, Robert
Romilly, Sir John
Russell, Fr. C. Hastings
Rutherford, Andrew
Sheil, Right Hon. Richard Lalor
Smyth, Sir Henry
Somerville, Right Hon. Sir William M.
Strickland, Sir George
Townshend, Captain
Trollope, Sir John
Vane, Lord Harry
Watkins, Colonel Lloyd
West, Frederick Richard
Willyams, Humphry
Williamson, Sir Hedworth

Tellers for the Noes, Lord Marcus Hill and Lord Edward Howard.

years, a wonderful progress has been made in many questions not lying quite upon the surface of society, but having received the attention not only of thinking men who do not act, but of that class of thinkers who know when action may safely and properly take place. We also shall state our reasons for thinking that this change of opinion is, to a certain extent, fairly to be ascribed to the Reports and Proceedings of the Society for the Amendment of the Law, and the exertions of its members acting as individuals, and we trust we may also make some small claim on this behalf for the Law Review. This much is certain, if any one reads the reasons on which the majority of 1834 acted, they will now be satisfied that they are purely contemptible, that a vague and unreasoning terror seized on the minds of the landed interest, and that it should have demanded as a boon what it then foolishly threw away. This truth by slow degrees has dawned upon them. There can be no doubt that this change of opinion has been silently going on; and that although there has been really no want of able and active supporters of the cause—persons both able and willing to explain the principles which should guide its direction, yet the truth lies deeper; and it seems pretty clear that there was also a strong under current which was only seeking some opportunity to make its appearance and sweep all opposition away.

It will then, we think, be admitted that, both as regards England and Ireland, the necessity of some great alteration in the law, as to the tenure and transfer of land, is universally acknowledged, and it is highly probable that even in the present session some effectual legislation may take place respecting it. All appear to be willing to promote the object; the only point in dispute is how this is to be accomplished. Under these circumstances, we think it may be useful to recall to the minds of our readers the recent history of the great changes which are now proposed, and which will in fact chiefly be found in our own pages, as we have endeavoured to record them as they occurred; and it will be seen how faint and timid were the first voices raised in this cause, and how loud and powerful they soon became. Nor will it appear that men have been found wanting, each in their several

parts, to carry on such portions of the work as were necessary for the perfecting a great measure; whether this duty consisted in considering the evil and devising and maturing the remedy, or in promulgating the truths connected with it, or facing the storm of execration and reproach which is sure at first to assail those who attack what appears to be the interest of any special craft or business. Nor have men at length been found unwilling to bring this subject before Parliament, to call for inquiry, to carry on continued investigation in committees, and boldly to bring forward, under circumstances of some difficulty, the necessary measures.

In referring to our own pages on these matters, we only use them as the easiest mode of tracing the history of the question: for, in the interval between 1834 and 1845, but little occurred; the seed was lying in the ground, but scarcely anything appeared on the surface: as part of that little, however, should properly be mentioned, the act for abolishing the lease for a year (4 & 5 Vict. c. 21.) and the Copyhold Enfranchisement Act (4 & 5 Vict. c. 35.), both passed in 1841, and the bold, though, for the time, unsuccessful attempt of Lord Campbell, in 1843, to legislate on the subject of the transfer of land; the uncalled-for and abrupt defeat of which really helped the cause and sowed those dragon's teeth which shortly afterwards appeared in the shape of the Law Amendment Society, its reports, its meetings, its lectures, and its proceedings. In making use of this work then, we do not wish to give it any undue prominence; but it will enable us to state the history of these important matters.

In our first Number we contented ourselves with calling attention to the recent alterations in conveyancing forms¹, and asked simply for general inquiry into the subject of conveyancing: "Let competent, experienced, and impartial men be directed to review our system of conveyancing, and report whether any alteration may be safely and properly made."

In August 1845 we ventured upon a bolder tone, and predicted on the strength of the conveyancing acts of that session,

¹ 1 L. R. 158. See also the art. "On the Early History of Conveyancing," p. 382.

that "the present practice of conveyancing was doomed¹," and in the following November² we find ourselves asserting that "a great change had commenced. * * * The law will always be stronger than the lawyer. There is no class of persons who will excite so little sympathy as a body of lawyers resisting a change attempted to be made in favour of the public, and possibly affecting the profits of the profession. Learned conveyancers under the Bar, and still more learned conveyancers at the Bar, will argue, sneer, contemn, denounce, rail, and ridicule it, but all will be in vain." And we concluded by stating our conviction that "a complete and searching reform in the practice as to the transfer of property is now absolutely necessary."

Nor was the opportunity of commencing the present inquiry and expressing a strong opinion in its favour long delayed. In the next session (1846) the House of Lords appointed a committee on the burdens of land; and among other subjects which were investigated by its members, the most prominent and important was the difficulty attending the transfer of land. Evidence was entered into by the committee at great length. We did our best at the time to direct the committee to a just conclusion³ by examining the distinctions, as to tenure and transfer, between real and personal estates, especially calling attention to the difference in value, in this country, of land and of stock; asking how the low price of land was to be accounted for, and stating our opinion that it arose mainly from: 1. The present state of the law as to the tenure of land. 2. The length, expense, and delay attending abstracts of titles and deeds; and 3. The stamp duties on the transfer of land.

The Lords' committee, in a remarkable manner, seconded the wishes of the conveyancing reformers: the great landed proprietors who sat on that committee drank in with delighted ears the legal evidence which proved that they had it in their power greatly to increase the value of their estates, and differing (as has been repeatedly stated) on all other subjects, they came to a unanimous recommendation as to

¹ 2 L. R. 406.

² 3 L. R. 475.

³ See 4 L. R. p. 164., art. "Burdens on Land."

"the improvement of the law of real property, the simplification of titles and the forms of conveyance, and the establishment of some effective system for the registration of deeds." And the committee further declared that they were "anxious to impress on the House the necessity of a thorough revision of the whole subject of conveyancing and the disuse of the present prolix, expensive, and vexatious system."

The importance of this report, whether we consider the weight of the persons who concurred in it, or the time at which it appeared (just after the repeal of the corn laws was settled), was not to be mistaken; and the Government shortly afterwards (February 1847) appointed a commission¹ which, after reciting that the select committee of the House of Lords had reported that they are convinced that the marketable value of real property is seriously diminished by the tedious and expensive process attending its transfer, directed the commission to inquire into the subject, and to state the means by which the registration of deeds and the simplification of the forms of conveyance could be effected.

The commissioners proceeded in their duty of inquiry, and called before them several gentlemen who they supposed could give them information on the subject of their inquiry. They had however been preceded in this duty by the Real Property Committee of the Law Amendment Society. This learned body, which was presided over by the late Mr. Duckworth, commenced its sittings on the 7th day of June, 1844, and had chiefly devoted itself to the consideration of the same subjects as the new commissioners were appointed to consider. They had published reports on the shortening of deeds, on dispensing with the security of satisfied terms², and not only on a registry of deeds according to Mr. Duval's plan, but on a registry of titles³, and on adapting the machinery of the public funds to the transfer of land, which was specially directed to the plan of Mr. Robert Wilson,—Mr. Wilson himself being a member of the committee. They had also reported on a territorial map, and on the principle of an insurance of titles.⁴ These reports, adopted

¹ See the purport of this commission stated 6 L. R. 163.

² 3 L. R. 183.

³ 4 L. R. 336, 351.

⁴ 7 L. R. 154.

to a certain extent by the Legislature¹, had entirely altered the state of the question, as it had been left by the first Real Property Commissioners. These Reports had opened questions of the utmost importance. The Terms Act had swept away for ever, with only a weak murmur of opposition, a vast system of apparent protection, but of real chicanery, intricacy, and expense. The conveyancing acts, if not adopted directly, had in fact a most important indirect effect, and had been taken by all wise and prudent practitioners as a parliamentary declaration against unnecessary length in conveyancing verbiage, and had forced those persons who affected most to despise them to adopt the spirit of their provisions and carry them into practice. They had also introduced the all-important principle that "the skill and labour employed and responsibility incurred in the preparation of a deed, and not its length, shall, on taxation, be the measure of its remuneration;" a principle, be it observed, which the House of Lords, in this session, has fully recognised and extended to all other deeds², and which will, we apprehend, become the law of the land without opposition. But important as these acts have been, the principles laid down by the other reports of the Real Property Committee not as yet acted on, were still more so, and the proceedings of the Society connected with them, and those words and speeches which, as on all similar occasions, spread throughout the land, penetrating into the most remote quarters, and caught up and receiving aid the most unexpected and unlooked for. These proceedings, in fact, have, as often happens, led to inquiries of a wider nature, than was perhaps intended by those who originated them. The question of a Registry, which for many years had only an interest confined to the precincts of Lincoln's Inn, or little beyond them, has risen to one of great moment, involving political considerations of transcendent importance. The easy transfer of land may shortly be the point on which the weal or woe of the country may greatly depend, and a spirit has arisen respecting it, of

¹ 8 & 9 Vict. c. 112., 8 & 9 Vict. c. 119., 8 & 9 Vict. c. 124.

² In a "Bill to amend an Act to facilitate the Conveyance of Real Property," (1849).

which it is difficult at present to predict the strength or the power. The agricultural interest, smarting under present losses, and vexed with suffering, which is the more bitter because it is not only likely to continue, but may become much worse, turns, and turns wisely, to this as a remedy for its present distress, and seems disposed to take the matter in its own hands, and settle it in a rough and ready fashion; and let it be remembered that if this is its will, it has the power to effect it. It is all very well for learned gentlemen, sitting at ease in their chambers, drawing admirable drafts, and raising most acute objections to abstracts of title, to say, and even to think, that no change can be made without their consent.

They may find, however, as in the case of the Terms Act, that while they are declaring the thing is impossible, in fact it is done. Great changes have not unfrequently been effected in this manner. If an act, drawn after the approved fashion, is essential, which is to share the usual fate of all acts—to be brought in at the beginning of several sessions, and to be abandoned at their close—which is eventually, in perhaps a mutilated form, to become law, and possibly turn out an abortion; why, then, we do not know that such an act has been drawn. But if the persons, who are owners of land in both Houses of Parliament (and who can deny that it is their question?) will resolve to settle the great principles on which the Registry shall be established; in our opinion they have already ample materials to enable them to do so, and ample time in the present session to accomplish it. All that learning, care, and ingenuity can contrive, is already at their service. They have, in the stores collected by the first Real Property Commissioners, and elsewhere, enough, and more than enough, for this purpose. And why do we assert this with boldness, and defy contradiction? Because to every person who knows how to read parliamentary language, the Solicitor-General, who is instructed as to the fact, distinctly told us so on the 7th of March last. If the present commissioners had really any very important contribution to make; nay, if they had any complete plan of their own to propose—to which all were willing to give in their unanimous adhesion, can it be doubted that before this, it would be laid before the world, and that the Solicitor-

General would have distinctly told us so? But instead of this, what did he say?

“The Commission to which the Honourable Member had alluded, and which had been no doubt now a long time engaged on the subject, consisted of men some of whom were most eminent persons in their profession, perfectly skilled to weigh evidence, and totally emancipated from any desire to adhere to the existing law. *He had been informed that they were about to make their report; and though it might not, as he understood, contain any very definite suggestion, it would very probably present a great body of evidence of immense value and assistance to any one undertaking to amend this branch of the law.*” — *Times*, March 8. 1849.

To this the report of the *Morning Chronicle* added that “a gentleman of experience was prepared to submit a scheme which was entitled to consideration;” whether the gentleman was one of the commissioners, or one of the witnesses, did not appear; but it was not represented to be the joint plan of the commissioners. Thus, then, it distinctly appears that they have, as a unanimous body, no distinct plan of their own. And who can blame the commissioners for this? Certainly not we. We have from the first humbly endeavoured to render them every assistance in our power. We knew the difficulty of the task. We were certain that their inquiry was in fact forestalled, and that they must either displace the reports already presented to the public by the Real Property Committee of the Law Amendment Society, or adopt them, or take the course which it would seem they are about to pursue — come to no unanimous conclusion at all. The ground was in fact already occupied. The Law Amendment committee had these great advantages. Without having any pretensions, as a body, to the learning or experience of some of the present commissioners, its members were more unfettered, as impartial, as little wedded to existing practice as such, and, on the whole, less open to professional bias, and having one object only in view — a desire to arrive at the truth. It was only after these investigations had proceeded for years, that they made the reports to which we allude, and all these were agreed to unanimously. It would have been unwise to have

adopted these reports prematurely and without grave examination, but it would have been rash to disregard them. We believe that the commissioners have done neither; but we apprehend that here has been the real cause of delay and difference of opinion among the commissioners. In forming this opinion we need not say that we have trusted to our own judgments, and have no authority for stating our impression.

We have indeed heard that, since this speech of the Solicitor-General, the commissioners, or a majority of them, have come to a conclusion, and are prepared to recommend a definite scheme, and this, under whatever circumstances it has been proposed, is entitled to respectful consideration. We doubt not, indeed, that when the report is made, we shall excuse its tardy appearance by reason of the great body of information there collected; the full consideration of the whole subject which it discloses; and the ample reasons which it will give, as well for adopting the plan recommended as the non-adoption of all others. All that we say is, that it is unreasonable to expect that all attempt at legislation is to be suspended indefinitely, in expectation of a report which may possibly after all help the question but little.

It was indeed also said that we should wait for the report, because with it there is a valuable body of evidence. Now, as to this, we believe it is no secret that the chief witnesses called were some of the members of the Law Amendment Committee, and we presume that however they might improve and extend their opinions, yet they adhered to them as given in their reports. Besides, this evidence, we apprehend, might, at all events, be published forthwith separately.

It was in this state of circumstances that Mr. Henry Drummond, the member for West Surrey, was induced to turn his attention to the subject; and we consider that it is highly fortunate for this great cause that it has been placed in his hands. Without adopting all his opinions, we may say that he appears to us a true specimen of an English country gentleman. Manly, shrewd, and courteous, he has the talent of stating important truths in a captivating manner. The stream of his eloquence runs deep, but there is always a ripple on the surface. More we could say, but we shall let him speak

for himself. Considering the audience that he was addressing, and the difficulties he had to contend with, we cannot conceive anything more happy than the manner in which he introduced the bill, every word of which address we recommend our readers to peruse and well consider. Thus was the bill launched. Mr. Henley, with characteristic astuteness, has well described it as proposing two important objects; first, a general registration of deeds; and secondly, that the transfer of deeds should be made through the Register Office. Somewhat disregarding the importance of the latter object, and the difficulties attending its adaptation to the present state of the law of real property, we think the bill, as a work of art, has been undervalued. In professional circles — the only one in which such a point is of any importance — it is well known to have been drawn by a gentleman of great ability and experience, who had taken no part in the Law Reform movement, is not a member of the Law Amendment Society; and to whom, at all events, the Conveyancers' Club can take no objection. If pangs they have, they are those of the spent eagle —

"They nursed the pinion that impelled the steel."

For our parts, we think the bill a manly and dexterous attempt to grasp and deal with the real difficulties of the subject. It has been carefully examined, and its effects stated, in the valuable pamphlet of Mr. Neale, himself a most useful and industrious labourer in the cause.

But the merits of this bill are really, in the present state of the question, of no great importance. It is impossible that any effectual legislation can take place in this matter, unless the Government join heartily in the work. But this bill is quite sufficient to raise the necessary points connected with the subject. A far more important matter is, how the bill was received by the House, with what temper it was met, and whether there is a real disposition to grapple with the subject. We shall therefore make one or two extracts from the speeches which were made on the second reading, on the 7th of March; and first let us see on what grounds it was placed by Mr. Drummond: —

“In the present stage of this measure it is not my intention to address any observations to lawyers. Up to this point it is purely a landowner's question; the lawyers have no interest in it whatever; if the landowners are content with things as they are, the lawyers have no cause to complain. I shall, therefore, address myself to the landowners alone, and endeavour to point out to them the real state of the position in which they stand, and then the method by which it is proposed to extricate them out of their difficulties. * * * *

“In former times the possession of land was held by military service. At the time of the Conquest, the whole of the kingdom was divided into about 720 baronies, (or honours, as they were sometimes called, amongst the largest of which were those of Clare and Richmond,) the owners of which were bound to bring to the king's assistance, when called upon, a certain number of armed retainers. These barons, in their turn, leased out to others portions of the lands on terms similar to those on which they held their own from the crown. The king would not suffer any alienation of these lands without being assured that the person who was to receive them was also capable of rendering him efficient service: hence fines were levied by him for giving permission to an heir to succeed to his father's inheritance; and when the inheritance came to females, they were compelled to marry as the king pleased, in order that he might be sure that he did not lose by the marriage the services which the owner of the property was bound to render.

“Then as now, however, landowners would run in debt; and when they did so they borrowed money of the Jews and such few merchants as inhabited the towns, and as now, also, they disliked to pay their debts. The creditors could not seize the lands because the king would not permit them to be alienated; they therefore applied to the judges, and although the creditor dared not go to the baron's castle and seize his person, the judge could order the sheriff to go with his civic guard and seize all the produce growing upon the land. The landowners, therefore, kept the land without enjoying any advantage from it, and the creditor enjoyed all the produce under the name of the *usufruct*. In addition to this mode of running in debt, they devised another, by which, instead of giving a part of their lands to their children, as they did at the beginning, they fell into the habit of giving a right to their wives, younger children, and other relations, to receive annually certain sums from the produce of the land. Hence arose trustees, or persons to whom the whole property was made over in order to pay

these charges first, and then to give to the owner the residue that remained. Hence, too, it frequently happened then, as it happens now, that the use and profit of the land was taken from the owner, and nothing was left to him but the empty title of owner and nominal possessor of that over which he had no control, and on which he could exercise no power except the equivocal advantage of the right to kill the wild animals found upon it.

“Much of this died out by degrees, partly under the Tudors, finally under the Stuarts; but those who became possessed of property when landowners were empowered to sell, began to ape the customs and manners of the barons, into a sort of fellowship with whom they had become associated; and they, in attempting to establish names and descendants, vainly endeavoured to foresee every possible contingency that could occur to their children and grandchildren, and placed their lands in the hands of trustees in order to carry out their intention towards their descendants. But they neither did nor could foresee all these contingencies; many arose in the development of time; and consequently it was necessary to have a court and an officer, whose duty it should be to decide on what would have been the intention of the deviser if he had foreseen the contingency, and also upon the best means of carrying that intention into effect.

“The employment of lawyers, then, in real property transactions is in correcting the errors which the follies of landlords have occasioned; and landowners complain most unjustly of the lawyers who are so occupied, whilst they have none but themselves to blame for the whole. The expense of sales is immense, owing to these causes. Before making a sale it is necessary to prove that with respect to your father, your grandfather, your great-grandfather—and I know not how much farther back—all the settlements that have been made are exhausted, and that every single person who could by possibility become entitled to the property is either dead or disposed of somehow. I have before me a list showing the heavy costs which have arisen in nine cases of sale of small properties, but will trouble the House with reading only one or two of them.”¹ (Pp. 3—10.)

¹ Most of these are familiar to our readers. Mr. Drummond adds in a note,—

“A respectable solicitor from Epsom has sent me a case where the purchase-money for a small property being 30*l.*, the expenses were 45*l.*

“A member of this House told me that he, being willing to accommodate a neighbour with a small piece of ground, let him have it at its fair valuation, and it cost him more to make out his title than he received from his neighbour.

“Two gentlemen in Surrey wanted to make a mutual exchange of lands in

Although, perhaps, an exception or two may be made to this statement, yet it is in the main correct. Now as to the remedy, and the particular plan proposed : —

“I contend that unless you will cut up the whole system by the roots you will do nothing. What I want to make the country gentlemen understand is this, — that it is their business to deliver themselves out of the hands of the solicitors. You are a solicitor-ridden people. It is possible to have the expenses of a court of law taxed; but how can you possibly tax any attorney’s bill? It is impossible. Every body complains of them; the more respectable part of the profession denounce them, but still the evil is unredressed. Complaints are also made of the cost and the length of legal instruments, of conveyances, &c.; but these, too, cannot be curtailed to any great extent, so long as the present system is continued. The landowners must resolve to emancipate themselves; no real and efficient help will ever come from the lawyers, any more than has come from the Reports of the Committees of the two Houses of Parliament, the labours of Crown Commissioners, and all other machinery which has hitherto been put in operation. The landlords must not rest satisfied until they have obtained the means of transferring any portion of their lands which they please to sell in as easy and simple a manner as they could transfer stock in the books of the Bank of England.

“The principle, then, upon which the House has now to decide is this, — first, that there shall be a registration of deeds and lands; and secondly, that sales shall take place by transfer in the books of the registry just as stock is transferred and sale of it made at the Bank. Every other method but this is futile. Registration, except with the view of making transfers in the books, is merely making a catalogue of deeds, or appointing some building in which they shall be deposited. * * *

“My object in bringing forward this measure is to endeavour to enhance the value of landed property, and to enable landed proprietors more easily to effect sales of small portions of the same, in order to liberate them out of their difficulties, and to give them facilities for investing more capital in the cultivation of their lands. In uncivilised countries land is the only possible property, for all other is insecure; in civilised countries it must

order to have a better boundary line to their respective estates. They therefore drew up an agreement, describing that such and such were the boundaries of their respective estates, and so evaded all law charges whatever. I doubt if such an arrangement could be maintained in a court of law.”

always possess more value than any other. Landowners have an influence in the neighbourhoods where they reside, especially where their possessions are hereditary, which no other capitalists possess; and hence the jealousy of them by upstarts of every degree: but land ought to have no legal immunities superadded to its intrinsic advantages, and its sale ought to be as free, and its transfer as easy as that of any other commodity." (Pp. 13—21.)

Now we have quoted these parts of the speech to show how bold a tone was taken in bringing the measure forward. What followed?

The Solicitor General said that no difference of opinion existed as to the great evils which prevailed in the established system, and as regarded the necessity of simplifying that system, so as to make the transfer of land as easy as that of so much stock. But he then addressed himself to the details of the bill, as to which we need now say nothing, for it is clear that the principle was all that was under discussion.

Mr. Page Wood (whose name is on the back of the bill together with Mr. Drummond's), placed the measure on its broad and just grounds. He properly, in this matter, defended the lawyers:—

"The Honourable Member for West Surrey had not done the lawyers justice; for the only persons who had hitherto brought the subject forward were lawyers, and the main opponents of legislation were the country gentlemen, who were the parties most interested. (Hear.) Sir M. Hale took the large and comprehensive view adopted at the present day with respect to the mode in which land ought to be dealt with. After describing the mischiefs which attended the existing system, in the great deceit which was committed in effecting secret mortgages, &c., whereby the rights of creditors were defeated, he said, 'that was more considerable in England, because indeed the great inland trade we have is the buying and selling of lands;' and the principle which he maintained was, that dealing in land ought to be as free as any other kind of dealing. Those views were followed up by Chief Baron Gilbert, Mr. Justice Blackstone, and others. He (Mr. P. Wood) would have preferred it, had Government proposed a bill. But there would have been no prospect of receiving the Report of the Commission appointed two years ago had it not been for the proceedings of the Honourable Member for West Surrey; and the suggestions of that commission might be so applied to the present

bill as to render it effectual for its purpose. It was not necessary to maintain that the bill was effectual and complete. The point for the immediate consideration of the House was its principle. This was the only civilised country in the world which had not a register of deeds. (Hear, hear.) In the American states there was a register; so there was in Ireland; and when the drainage of the Bedford Level was commenced it was determined to have a system of registration. In France, Belgium, and Holland, land sold for thirty-five years' purchase instead of thirty-one or thirty-two; in Belgium as much as forty-four years' purchase was given. That was attributable to the existence of general registers. Why should Parliament go on year after year trifling with Reports, and doing nothing?"

With these views our readers are tolerably familiar. Let us see how far they were adopted by the House.

Sir George Grey, while he opposed this particular bill, which of course he was bound to do as a member of Government, in the absence of the commissioners' report, declared himself in favour of a register, and noticed that no one had expressed a hostile opinion, and that it was very satisfactory to take what had occurred that day as an indication of the great change of opinion which had arisen in that house as to the benefits likely to attend the establishment of a register.

All the other members who spoke, but more especially the country gentlemen, expressed themselves in favour of some system of registration; and the result of the division we have already stated. This, under the circumstances, is a victory of no ordinary importance, and it has been admirably followed up by the nomination, on the 23rd of March, of the following committee:—

Mr. Armstrong, *Mr. Cayley*, *Mr. Wood*, *Mr. Wilson Patten*¹, *Mr. Solicitor-General*, *Mr. Adderley*², *Mr. Headlam*, *Mr. Roundell Palmer*, Sir John Packington, The Earl of Arundel and Surrey, Mr. Christopher, Mr. William Miles, *Mr. Bouverie*, Mr. Drummond, and *Mr. Stuart Wortley*.

We have placed the names of the lawyers in italics, and we find there are thus seven lawyers, all excellent men for the purpose, and eight country gentlemen, and better could not

¹ Since replaced by Mr. Campbell.

² Since replaced by Lord Jocelyn.

have been selected. We are quite content to leave this important subject in their hands. We do not doubt that they will receive the assistance of her Majesty's Government, and also of the present Real Property Commissioners, and that they may thus come to some satisfactory conclusion, — possibly in the present session. It cannot be expected that they can themselves prepare the necessary bill. But they can resolve on the principles on which it can be founded. Several points were raised by Mr. Drummond in his speech; some {of which this committee may perhaps settle.

1. Some alarm has been expressed in certain quarters as to the effect of this bill on the present emoluments of lawyers. Perhaps Mr. Drummond has strengthened the feeling by saying, "no real and efficient help will ever come from the lawyers;" and in speaking, certainly, with no great respect of the solicitors as a body; on the other hand, he admits that he has been assisted by "a respectable solicitor from Epsom." (p. 11 n.) And in the course of his speech he speaks with respect of several other lawyers. Nor can he mean to repudiate by these expressions their services — for he knows too well that if the land is to be unfettered, it must be by the joint assistance of lawyers and landowners, and the former are at least as important and essential to the work as the latter. All that he means, we are persuaded, is that hitherto the lawyers, that is, the country attornies, have done what they could to throw out the bill (which is true), and that the profession, as a body, have been more fond of pointing out the errors of particular measures brought forward for giving freedom to the land, than of producing a better. We doubt whether Mr. Drummond will long have justly to complain on either of these heads. A vast change of opinion has, we think, come over the minds of solicitors, both in town and country, and he will meet but little opposition, as we believe, to the principle of a Register; and we apprehend that we shall soon have an abundance of plans and schemes of Registration from all quarters.¹ As to its effect on the profits of the profession,

¹ We refer our readers with confidence to the careful plan proposed by Mr. Neale. See the appendix to his work, and this has been since, we understand, elaborated into a bill. See also a petition presented to the House of Commons by the Somersetshire Society of Attornies, and printed with the Votes.

we never were so confident on any point, as that a Register will greatly increase all fair and just profits. In the opinion of persons the best informed, it will create a general stir as to real property. This can hardly be avoided. There would in many quarters be a general desire to register; at all events, most landowners would wish to consider and be advised whether they should do so or not, and who could they consult but their professional advisers? If any one supposes that the services of lawyers are to be dispensed with by some summary process or short act of Parliament, he is, in our opinion, most woefully mistaken. Whether a system of registry might, when established, be worked without professional assistance, is exceedingly doubtful; but, that it could be established, and commence operations without it, is utterly impossible. The existing race of lawyers, all over the country, will, if they know their own interests, strengthen the hands of those who wish to establish it. We need not say that we do not join in any censure on any class of the profession. We wait for some evidence of their opposition; at present we see none at all.

2. The next point raised by Mr. Drummond is thus stated by him:—

"The question that next arises is, 'Who is to register?' The country gentleman in his simplicity answers, 'I, the owner, am to register.' Yes, but first you have to prove that you are the owner. An equity lawyer is very like a policeman in this respect; the policeman, when he sees a man in a good coat, thinks that he ought to be 'had up' before a magistrate, and made to give an account as to how he came by it; and a Chancery lawyer says to the country gentleman, 'Ah! it is very well for you to suppose that those broad acres belong to you, but has your title ever been examined?' Here, then, is the difficulty: if you are to have an examination of all the titles that are to be registered, you may call it by what name you please, but it is, in fact, instituting *quoad hoc* another court of equity. On the other hand, if there be no examination of titles, there is no security against a man entering lands as his which do not belong to him, and effecting a sale of them the next day."¹ (P. 15.)

¹ It is very convenient to objectors to detail evils that may arise under this

As to this, we think it may be well, in the first place, to make the registry voluntary, giving the act of registry, as such, no effect until after a certain period has elapsed. Let us content ourselves with this, in the first instance, and do not let us embarrass this important act by any other considerations. Means will be taken to deal with past titles safely and cautiously, as to which some application of the doctrine of assurance of titles¹ seems to afford the readiest mode. There is another objection to a compulsory registration of all deeds, which is thus put by Mr. Drummond:—

“Another objection equally strong is the necessity of having previously in operation an immense machinery. The number of landowners is variously stated by statistical writers from between 80,000 to 280,000; nor is it easy to point out whether copyholds of inheritance and on fine certain, long leaseholders, leaseholders on lives, and many others, are included in either enumeration. In this case the registrar, his office, clerks, and all attendants, books, and schedules, must be prepared and ready for instant operation on the same day when all these deeds shall be brought in to be registered. Now it is impossible to ascertain beforehand how many books, clerks, &c., shall be required. In Edinburgh there are sufficient entries to require four hundred folio volumes to be annually filled.

“On the other hand, if the registration be voluntary, it gives the opportunity of feeling our way, of commencing with a few books and a small office, and a moderate establishment of clerks, all of which can be enlarged as business increases; and as in Scotland they have both a general and provincial registry, so there may be here first a central registry office in London, which may be expanded so as to have provincial registers in every county, under the superintendence, however, of the registrar-general in London.”

bill, and to leave unmentioned similar evils under the present system. Nothing can at present prevent two attorneys pretending to be the agents for a mortgagee and for a landowner, going before a judge and declaring that a judgment is satisfied, and getting a certificate of the same, and so clearing the land from the effect of it.

¹ We have recently observed by the newspapers some attempts to establish companies for carrying out this species of assurance. This may assist the general knowledge of the principle, but is otherwise, as we think, premature. At all events, the first step in the formation of any such company must be the nomination of directors of character and respectability well-known to the legal and commercial public.

3. As to whether the register should be a metropolitan, or provincial, or district register: and, as to this, we are glad to see that Mr. Drummond leaves it open for further consideration. We have a most decided opinion in favour of a system of district registries, communicating with one common head in the metropolis. Not only is it the best but the only one which can by possibility be carried.

And now, in conclusion, we would ask, what does all this mean? Are the country gentlemen going to turn conveyancers? Is every man about to become his own lawyer? What great interest have owners of land in the matter? Of what vast consequence is it whether the deed is a little more or a little less expensive; this cannot, after all, make much difference. It is all very well to inquire into these matters, and very proper to reduce the length of recitals and the cost of abstracts, but, surely, it does not much signify. No person who wishes to buy land seriously grudges the expense of the transaction; the inquiry is, in fact, never made. It is, seriously, of no great importance which way it is settled. These are the kind of remarks which we hear from many sensible men. And if it were a mere conveyancing question, we should very much agree with them. We doubt very much whether it would be advisable, if the only thing to be gained were a cheaper system of conveyancing, to alter the whole system of dealing with land in this country. It would be very desirable to obtain a better system, but it might be paid for too dearly. But to look upon this as a conveyancing question, is to take a very narrow view of the subject. It involves in our opinion the future stability and prosperity of the country; it involves the mode of carrying on its government; the mode of raising a revenue to pay for that government. In this subject are involved those important questions which are agitating Europe, and which are occupying the attention of all reflecting minds in this country.

Let us hear what a great thinker, and even a greater actor in the affairs of life, has very recently said as to this:—

"Moveable property, or capital, has acquired, and continues to acquire, an ever increasing extension and importance in the communities of modern Europe. It is evident that the progress of civilisation in our times is entirely in favour of its development; a just requital for the immense services which capital has rendered to civilisation.

"But this is not enough: efforts are continually made to assimilate immoveable to moveable property: to render land as transferable, as divisible, as convenient to possess and improve as capital. All the proposed innovations, direct or indirect, in the laws relating to landed property, have this object in view, either openly or covertly.

"But though a movement so favourable to capital is going on, landed property is still the most considerable in France, and still holds the first place in the estimation and the desires of the people. Those who possess it addict themselves more and more to the enjoyment of it, and those who do not possess it are more and more eager after its acquisition. The great proprietor is returning to the taste for living on his estate: the tradesman who has earned a competence, retires to the country to enjoy repose: the peasant thinks of nothing but how to add field to field. Whilst every thing is done to favour the development of capital, landed property is more in request and more prized than ever.

"It may be confidently predicted that if, as I hope, social order triumphs over its insane or depraved enemies, the attacks of which landed property is now the object, and the dangers with which it is threatened, will, in the end, enhance its preponderance in society. Whence arises this preponderance? Is it merely because, of all sorts of property, land is the most secure, the least variable; that which best resists the perturbations, and survives the calamities of society?

"This motive, though real, powerful, and obvious, is far from being the only one. There are other motives, or rather we may call them deep-seated instincts, whose empire over man is great, even when he is unconscious of it. These secure the social preponderance of landed property, or restore it when transiently shaken or enfeebled. Among these instincts, two appear to me the most powerful; it will be sufficient to indicate them, for an attempt to fathom their depths would carry me too far.

"Moveable property, or capital, may procure a man all the advantages of wealth; but property in land gives him much more than this. It gives him a place in the domain of the world—it unites his life to the life which animates all creation. Money is

an instrument by which man can procure the satisfaction of his wants and his desires. Landed property is the establishment of man as sovereign in the midst of nature. It satisfies not only his wants and his desires, but tastes deeply implanted in his nature. For his family, it creates that domestic country called home, with all the living sympathies, and all the future hopes and projects which people it. And whilst property in land is more consonant than any other to the nature of man, it also affords a field of activity the most favourable to his moral development, the most suited to inspire a just sentiment of his nature and his powers. In almost all the other trades or professions, whether commercial or scientific, success appears to depend solely on himself—on his talents, address, prudence, and vigilance. In agricultural life, man is constantly in the presence of God, and of his power. Activity, talents, prudence and vigilance are as necessary here as elsewhere to the success of his labours, but they are evidently no less insufficient than they are necessary. It is God who rules the seasons and the temperature, the sun and the rain, and all those phenomena of nature which determine the success or the failure of the labours of man on the soil which he cultivates. There is no pride which can resist this dependence, no address which can escape it. Nor is it only a sentiment of humility as to his power over his own destiny which is thus inculcated upon man; he learns also tranquillity and patience. He cannot flatter himself that the most ingenious inventions or the most restless activity will ensure his success; when he has done all that depends upon him for the cultivation and the fertilization of the soil, he must wait with resignation. The more profoundly we examine the situation in which man is placed by the possession and cultivation of the soil, the more do we discover how rich it is in salutary lessons to his reason, and benign influences on his character. Men do not analyse these facts, but they have an instinctive sentiment of them, which powerfully contributes to that peculiar respect in which they hold property in land, and to the preponderance which that kind of property enjoys over every other. This preponderance is a natural, legitimate and salutary fact, which, especially in a great country, society at large has a strong interest in recognising and respecting.”—*Guizot on Democracy*, pp. 40–44.

It is, in fact, a great European question at this moment¹,

¹ It is, perhaps, worth mentioning that the writer of this article was in Berlin in September, 1847, chiefly with a view of inquiring into the registry system

"how land can be *mobilized*," and that state is best off that can most completely solve the difficulties. Belgium (which is fast becoming a model state), some of the smaller states of Germany, and some of the cantons of Switzerland, have, we believe, attained nearest to perfection. But England and Ireland are notoriously a long way behind all other European states. It appears to us obvious, then, that if we are to try a change, it must be one which will give us what we want, will enable us to obtain a ready mode of dealing with land and borrowing money on land. Any attempt to establish a registry which will simply add the ceremony of registry to a deed (although this may be good in itself) will fall far short of the mark. Indeed, it cannot be proposed by any one really understanding the true position of the question. It will be set aside not only by the conveyancing reformers, but by the small tradesmen, who now vest their savings in building societies, under stipulations which may easily be seen, limiting the cost and risk of the transaction.

Thousands of persons are now looking out in this country for the extension of a system like this, which will bring within their reach the power of easily buying and selling land. We never supposed that professional assistance could or ought to be dispensed with. All that we have asserted is, that the cost must be defined. We do not know that in the great bulk of transactions it will be decreased; but it must be regulated by the value of the property; it must be certain, and precaution must be taken to prevent the possibility of the occurrence of those enormous bills of costs which now scare the majority of purchasers from all dealings in land, and which give the best handle and excuse for a hasty and reckless alteration of the present system.

Let us, if possible, find in our own land some illustration of what we want. There is a class of manors, chiefly in the north of England, which, so far as their jurisdiction extends,

there. On entering the well-known shop of Asser, the bookseller, in the Underden Linden, to make inquiries as to some books on the subject, he found that worthy bibliopole in conversation with a gentleman, who shortly afterwards left the shop. On mentioning the object of the visit, "Why," said Mr. Asser, "I have just written out a list, as the gentleman who has just gone has been sent here by M. Guizot to make a similar investigation."

go far to furnish us with examples of an easy, cheap, and concise system of transfers and dealing with land. The court rolls afford an excellent register. A small fine (1*l.*), payable on transfer, serves to identify the parcels for which it is paid; the fees of the steward are regulated, and rarely exceed a few shillings; the legal estate is alone taken notice of by the steward; the form of transfer is uniform; and it follows, from all these circumstances, that the number of transfers is extraordinarily large, and therefore, although the fees are small, the steward does not complain. This last point, perhaps, may not be uninteresting to some of our readers; and we can vouch for the truth of the statement, from having had personal communication with several gentlemen holding these situations, and we hope to be able, in some future number, to give the result of these communications in a more detailed form. It may be possible that without going beyond the seas (which perhaps will rejoice some sturdy John Bull), or introducing any untried scheme or plan, to find a system which may form the germ of the necessary change.¹ A hint of some such

¹ See also as to the Channel Islands, a statement given by a correspondent of Mr. Drummond: — “I am much indebted to you, and so will every striving Englishman, if you carry your bill for Disposing of Property by Registration. Permit me to say, that I was brought up from an early age in Guernsey. I remained there till I was twenty-seven years of age. At twenty-five I bought a house, garden, orchard, with sundry outhouses, &c. &c. The vendor and his wife met me at the registrar office. We went before the chief magistrate, and declared that the vendor and his wife consented to the sale or transfer. I, on my part, declared that I wished to purchase. We all went down out of the court room to the greefe's office. The transfer was then registered in the court books with our names, dates, &c. &c. written on the back of the contract (deed). The vendor paid 5*s.*, and all was complete. I kept the property some years, and sold it on the same easy terms, and paid 5*s.* for registration, and all was well done. The property was freehold, and that sale will hold good for ever. Now see the baneful effect of English conveyance. I am a builder; have built nearly 400 houses in England. Half my profits have been eaten up in law charges; and am many hundreds worse off by the waste of law charges. To give you some idea, lately I built a small house at Kilburn, to let for 40*l.* per annum; my deed from the freeholder was upwards of

The conveyance to sell	-	-	-	£20	0	0
The under-lease to occupier	-	-	-	17	0	0
District surveyor's fees	-	-	-	20	0	0
				4	15	0

61 15 0

“In Guernsey the cost would have been 15*s.* In this country the poor man must remain poor.” (P. 4. n.)

plan may be gained from the evidence of one of the witnesses before the Committee on Burdens of Land.

"5310. In the transfer of mortgages in Yorkshire, which is a register county, is there not an additional expense in consequence of its being a register county?—There is some additional expense in all dealings with property. There is going to the registry office; and there I think great caution should be used in establishing a registry, because if great care was not taken in that respect, the cost would press more hardly upon small transactions. I think the great difficulty of our present law of property is, that you discourage small dealings in land. Of course the expense would be uniform, and the register of deeds would increase the expense upon small properties; but I have no doubt a system might be devised in which the expense would be very trifling.

"5312. But if the tenure in England were treated as a copyhold, and the state as the lord of the manor, would not that be as simple a title as any person could have? What objection would there be to have all property simply held as a copyhold is by copy of court roll, supposing the state to be for that purpose the lord of the manor?—I have stated that I believe you may have an uniform mode of transfer, or a mode of transfer nearly uniform, for similar transactions; but I do not think that the mode of transfer should be in the copyhold form. I consider that you have in copyholds two advantages. You have a greater simplicity of title, which arises from the register, and you have a greater simplicity of deed, and you have an uniform deed.

"5313. What disadvantage is there in it?—I think there are very great disadvantages in the copyhold tenure.

"5314. The question refers to copyholds without fines, a simple holding by copy of court roll without any fine?—I am not aware of any copyhold without any fine. There are copyholds with small fixed fines.

"5315. You have stated that you believe the copyhold tenure to be as safe to the holder as any freehold tenure. If the copyholder holds his title upon a small piece of paper, what reason is there why the freeholder might not, by some establishment of office, hold his title in as simple a form?—I think he could. *I think you should take the advantages of freeholds and apply them to copyholds, and the advantages of copyholds and apply them to freeholds.*"

In further corroboration of this view we shall give the

answers to certain questions submitted to the steward of one of the manors to which we allude, with which we have been favoured. At present we need not give the names, but our readers may rely on its accuracy:—

“*Name.*—Manor of ——— in the county of ———.

“*Extent.*—Seventeen miles in length, and an average width of six miles.

“*Number of Tenants.*—Between four and five hundred.

“*Quit Rents.*—Range from one penny upwards, to two pounds ten shillings; but only one of the latter amount: the average annual rent will not exceed, for estate large and small, ten shillings.

“*Division of Manor.*—The manor is divided into two large and twenty small districts. The two large divisions are called East ——— and West ———; the smaller divisions are called Graveships, and are named according to their respective localities.

“*Uses of this Division.*—The larger divisions each provide a jury of twelve, to attend a half-yearly court; and at these courts, and by these juries, all presentments of the deaths of tenants, and of the heirs at law of such deceased tenants, are made. The smaller divisions, the Graveships, are for the easy collecting of the manorial rents, which are collected by the grave of each graveship, and by him paid to the steward, at the half-yearly courts without any fee.

“*Tenement.*—The tenements are held at the will of the lord, according to the custom of the manor.

“*Customs.*—The payment of a fine, equal to the annual payment or alienation, or on admittance of an heir at law. Some of the tenements pay in addition, every five years, a second annual rent: this is called a grassom rent.

“There are no heriots, boon-days, or services of any kind, except the attendance of the court, which is sufficiently answered by the attendance of a jury from each division, and of the graves. The roll is, however, always called over. On the death of the lord of the manor a fine of one penny is paid on each tenement. The bailiff has no fees (except on special courts), he being paid by holding a small estate in virtue of his office.

“*Special Courts.*—Any tenant can have a special court, either within or out of the manor, by paying an extra fee; but they are of comparatively rare occurrence.

“*Mode of Transfer.*—By surrendering into the hands of the steward, and admittance in open court, as at a special court.

“*Register.*—A complete registration of all transfers is kept by

the steward, with an index, so that a title can be traced back in a few minutes, by means of reference to a very remote period.

"*Fees.* — Fee to the steward on each transfer, seven shillings.

"*Form of Transfer.* — Manor of ———, at a court held, &c. &c. &c.

"*Date of last Admittance.* — Before J. T. Esq., steward.

" *day of* , 1849. — To this court came A. B., and did surrender into the hands of the said manor one messuage and tenement, &c. (describing it).

"*Rent Five Shillings.* — To the use of C. D., his heirs and assigns for ever.

"And then, upon the same court came the said C. D., and took of the lord of the said manor the messuage and tenement aforesaid, with the appurtenance, to hold the same to him, his heirs and assigns for ever, according to the custom of the said manor (*fine five shillings*), and having paid the lord for his fine, as in the margin, and done his fealty, is thereupon admitted. Tenant by pledges, E. T. and G. H.

(Signed)

"I. K. Steward.

"If a mortgage, Habendum to C. D., subject nevertheless to redemption by said A. B., on payment by him, his heirs, executors, or administrators, to said C. D. of 1000*l.*, and interest, at the rate of, &c. on the day of next. If a trust to the use of C. D., reserving nevertheless to the said A. B. the use thereof during his natural life.

"Or such other trust as may be required."

The following rough statement by the steward of the manor (not intended for publication) accompanied this information.

"I have thought a good deal on the subject since, and really can see no reason why conveyances of all property should not be simplified to a degree that might appear alarming to some people who dread change. Why, for instance, could not an act be passed, declaring all land to be of one tenure? Call it freehold, copyhold, queenhold, or any other hold you please, — declaring all such existing manorial rights and boundaries, &c., which (as in ———) would facilitate the conveyance, to be continued, and giving power to commute by commutation all the oppressive or inconvenient customs and payments; declaring, as is usual in the explanatory parts of acts, that such and such words mean such and certain things, as, a conveyance to A. B. and his heirs and assigns, from

C. D., should mean the absolute disposal of the fee-simple; and if 'warranty the title,' was superadded, or some words to the like effect, they should mean, and be as good as a long string of covenants of title, quiet possession, &c. Then all limitations, whether in trust, in tail, or otherwise, might be done in a few words, if a declaratory act was passed.

"Again, I would suggest this, or some similar plan. On the Government survey being completed, and I believe it is far advanced, I would divide the country into districts, according to circumstances; the plans are on such a scale that every field is marked. These I would number as we do in the ————. Thus superadding to the description the additional security of a number; and I would make the conveyance, of what nature soever it was, as short a document as our ———— admittances, — 'according to the statute,' assuming that the statute declaratory, as before mentioned, is passed. Thus A. B. surrenders his five fields at Hampstead, parish of Hampstead, district B. 3. Nos. 6, 7, 8, 9, 10, to C. D. on a mortgage, to secure 1000*l.* and interest, at 5 per cent.; and C. D. is admitted to hold the same on conditions according to the statute. Any special arrangement as to time could be shortly introduced; and so I think might all limitations be managed by reference to the statute, which shall have defined the meaning of the words to be used, according to the wishes and circumstances of the parties disposing and receiving.

"A register of course to be kept; and I *cannot suggest any improvement on ours, which is as simple as possible*; each district to have its registrar, (a resident professional, steward of manor, or clerk to union, as may be thought best); duplicates of register, in case of fire, loss, or to avoid being tampered with, to be forwarded to chief registrar in London, for safe custody. These would not be very voluminous."

We respectfully recommend the Committee to make some inquiry as to these manors: and the view is somewhat confirmed by the Bill "for the compulsory enfranchisement of copyholds," just brought in by Mr. Aglionby, which proceeds on the principle of leaving the tenure untouched, commuting the incidents and regulating the fees of the steward, and thus preserving the excellent system of registration which now prevails in some manors. We are so sanguine as to think that the labours of this Committee will have an enduring place in the annals of legislation.

ART. X.—MR. STARKIE.

THE profession, the public, and the cause of sound and judicious Law Amendment have sustained a great loss in the death of this eminent lawyer. Upon this Journal his memory has further and peculiar claims.

Mr. Starkie was called to the Bar in May 1810, and immediately joined the Northern Circuit, on which he went till a few years before his decease. He had previously been highly distinguished at Cambridge, where he was Senior Wrangler; and his classical attainments were also of a high order. On the circuit and in Westminster Hall he early became possessed of respectable second business as an able and skilful pleader; and his works on the Law have always been justly esteemed of the greatest merit and value. His Treatise on Criminal Pleading, his work on the Law of Slander and Libel, and, above all, his elaborate and complete Digest of the Law of Evidence, are treatises of very great merit; and, especially the last named, of extraordinary use to the profession. Whatever be the merits of Mr. Phillipp's and Mr. Serjeant Peake's works, that of Mr. Starkie has the advantage of them both in the rare and most important quality of being easily accessible. It is a book in which the reader is sure to find the point he is in search of. The cases, too, are all given with the utmost diligence in the notes. His *Nisi Prius* Reports were also distinguished for their ability.

Mr. Starkie was known and esteemed in the profession for the fulness of his information, and the resources which he placed at the service of his leader and of his clients. Having for only a few years enjoyed professional rank, he was not known in leading causes. He was called within the Bar at Lancaster by the privilege which the Judges of Assize sitting in Bank there have of giving local rank in the County Palatine; and he was for some years also King's Counsel in Westminster Hall. He was for many years Downing Pro-

fessor of Law at Cambridge, and he delivered a course of Lectures in the Inner Temple. But it would be wrong to withhold the fact that his talents lay not in this line, and that his Lectures, however learned and able, were not successful. There is the more reason for frankly stating this, because his failure in the chair of the Temple might otherwise be used by the persevering adversaries of Legal Education, as connected with Lecturing, as an argument against this necessary proceeding.

But the most distinguished part of this learned person's career was his important labours in the Commission for the Amendment of the Law, and especially for its digesting into a Code. The services of this eminent person in the Criminal Law Commission were truly invaluable. His unbounded knowledge, his intimate acquaintance with the Criminal Law in practice as well as in theory, his acute and subtle understanding, his immense powers of labour—all qualified him in a singular manner for the performance of this most important task. Accordingly his colleagues have ever borne the most unqualified testimony to the invaluable advantages derived from their distinguished fellow labourer. It is truly to be lamented that before the more difficult portion of this great work is finished, the Digest of Procedure, they should, by the hand of death, have been deprived of his assistance.

For the last two years of his life, Mr. Starkie occupied the important station of Judge of the County Court for the greater part of Middlesex. No one could more ably discharge the duties of this useful office. Those who knew his talents and acquirements might feel regret that they did not see him in a more exalted position. But he himself made no complaint, and manfully gave himself up to the discharge of the important duties committed to him.

To this Journal his labours were occasionally made available. To the *First Number* he contributed Art. III. On the distinction between Questions of Law and of Fact. In the *Second* he gave Art. XII. On the Consolidation of the Criminal Law; and in the *Fourth*, Art. X. On Trial by Jury, which attracted the attention of Foreign Jurists in a remarkable manner.

We have been favoured with some further particulars as to Mr. Starkie, from a source which may be implicitly relied on.

He was born on the 12th of April, 1782, at the vicarage-house, Blakeburn, which living his father held. At ten years old he went to the grammar-school at Clitheroe, where he continued until he was seventeen, when he came up to St. John's College, Cambridge. He was the favourite scholar of Mr. Wilson, his master, and was much attached to him. He often said that he was the wittiest man he ever knew. He took his degree in 1803; was not only first wrangler, but Smith's prize man. After which he was for a short time fellow and tutor of Catherine Hall, until he married Lucy, the daughter of Thomas Dunham Whitaker, of the Holme, Lancashire, author of many valuable local histories. It is worthy of remark that Mr. Starkie's father, born at the Manor-house, Twiston, Lancashire, was also senior wrangler of his year, and fellow of St. John's. Mr. Starkie was not the first lawyer of his family, as his relative, Sir Humphrey Starkie, was Chief Baron of the Exchequer in the reign of Richard III.; and an estate which he enjoyed in his lifetime was an inheritance of nearly five centuries.

We add a few other particulars as to Mr. Starkie and his father:—

ST. JOHN'S COLLEGE.

Extracts from College Register.

"Thomas Starkie—Son of the Rev. T. Starkie, Vicar of Blakeburn, and formerly fellow of this College—Lancashire—Blakeburn—Pensioner—Wood and Smith—Jan. 2. 1799.

Electio Discipulorum.—Nov. 4. 1799.

"Ego Thomas Starkie, Lancastriensis, juratus et admissus sum in discipulum hujus Collegii pro Episcopo Lincolnensi. Decessore Dr. Jackson."

From College Register. 1769.

"Thomas Starkie, filius Jacobi Starkie, natus ad Downham, literis institutus in Schola Sudbergiensi, commendatus a M^{ro} Scales, admissus est Subsizator Maii 29. 1767. Tutore et fidejussore ejus M^{ro} Abbot, annos natus, 17.

Electio Sociorum.—1771.

"Ego Thomas Starkie, Lancastriensis, juratus et admissus sum

in perpetuum socium hujus Collegii pro Magistro Ashton. De-
cessore Mr^o Braithwaite."

The titles and dates of the works published by Mr. Starkie,
with the dates of the editions, are as follows:—

1. A Treatise on the Law of Slander, Libel, and incidentally,
of Malicious Prosecutions.

1st edit.	„	8vo.	„	1812.
2nd edit.	„	2 vols. 8vo.	„	1827.
3rd edit.	„	2 vols. 8vo.	„	1830.
2. A Treatise on Criminal Pleading, with Precedents of In-
dictments, Special Pleas, &c.

1st. edit.	„	2 vols. 8vo.	„	1814.
2nd edit.	„	2 vols. 8vo.	„	1819.
3. Reports of Cases determined at Nisi Prius in the Courts of
King's Bench and Common Pleas, and on the Circuit, from
the Sittings after Michaelmas Term, 55 Geo. 3., 1814, to
the Sittings after Michaelmas Term, 3 Geo. 4., 1823, in-
clusive. 2 vols. royal 8vo., and vol. 3. part 1, 1817—
1823.
4. A Practical Treatise on the Law of Evidence and Digest of
Proofs in Civil and Criminal Proceedings.

1st edit.	„	3 vols. 8vo.	„	1824.
2nd edit.	„	2 vols. royal 8vo.		1833.
3rd edit.	„	3 vols. royal 8vo.		1842.

ART. XI. — NOTICE OF NEW BOOKS.

*A Summary of the Law of Attornies and Solicitors, describing
their legitimate Province, the Regulations as to their Admis-
sion, Disqualification and Re-admission, &c.; their Duties and
Functions in the general Practice of the Law; their Rights,
Privileges, and Liabilities, and the Mode and Forms of
Proceeding by and against them. (With an Appendix of
Statutes.)* By ALEXANDER PULLING, Esq., of the Inner
Temple (Barrister at Law), pp. 400. Butterworth, 1849.

MR. PULLING is already favourably known to the profession
by several highly useful and practical books; and we have no
hesitation in saying, that this work now before us is deserving

of great commendation. It is an attempt to treat practically of the legal regulations applicable to those whose peculiar province it is to dispense the law to others. The author seems to have originally contemplated a general treatise on the Officers and Practitioners of the Law, and we incline to think that a work embracing the legal regulations, peculiarly applicable to the offices of Judge, Magistrate, and law officers in this country, with those which govern the professions of the Barrister and Attorney, might be a valuable contribution to our law literature. But disquisitions on detached subjects seem to be the fashion of the day ; and thus our author's contemplated treatise on the *leges juridicales Anglicanæ* gives place to a work on the Law of Attornies ; just as he observes in the Preface, MS. notes collected by him in two previous instances, "with the ambitious design of forming distinct general works on local and commercial law, were ultimately adapted to the very minute subjects of the local *Laws and Customs of the City of London*, and the *Law of Mercantile Accounts*."

The Law of Attornies and Solicitors, however, is by no means a scanty subject for a legal treatise, and in the closely printed volume before us, there does not appear to be much redundant matter. The rules of the Common Law, the various acts of Parliament, and rules and decisions of the Courts at Westminster with respect to attornies and solicitors, and their functions, rights, duties, and liabilities, are here treated of in eight chapters: the first three of which treat of the regulations as to their admission, legal qualifications, &c. ; the fourth, of their office, functions, and duties in the general functions of the law ; the fifth, sixth, and seventh, of their rights and liabilities, &c. ; and the eighth, of the various modes of proceeding by and against them.

The *law of attornies* is treated of in various other works, and with respect to the subjects of the first and last parts of Mr. Pulling's work, his claim to credit rests principally on his arrangement, style, &c.

The fourth chapter, however, which forms a considerable portion of the work, like the Introduction, bears the stamp of originality of design. It treats in a concise manner of the

peculiar duties of attornies and solicitors, in the conduct of their profession, with respect to actions at law, suits in equity, proceedings in local courts, criminal cases, bankruptcy and insolvency, parliamentary business, conveyancing &c. &c.; and, looking at the extensive field over which this disquisition extends, we can but agree with our author in the observations which he makes in the introductory chapter, as to the marked contrast between the avocations of this class of practitioners, at the present day, and those which devolved upon them a few years ago.

“ The ordinary business of attornies and solicitors at the present day extends over a very wide field; they are not only engaged in conducting the formal proceedings, both in civil and criminal cases, in our courts of justice, and in serving and receiving the requisite process, pleadings, and notices in such cases, and attending the courts, judges and public offices, but the arduous and responsible duties devolve on them of previously investigating the matters in controversy, (by personal communication with the client they are retained for,) collecting and analysing the evidence of the client's case, summoning the necessary witnesses, and taking down notes of the depositions preparatory to their being sworn and examined in the cause, preparing and delivering the briefs, &c. for the trial or hearing, and taking the necessary proceedings consequent on the judgment of the court.

“ *Other Duties devolving on Attornies and Solicitors.* — In addition to these duties in courts of justice, this class of practitioners are also generally employed in soliciting business in Parliament, obtaining private acts, and attending Parliamentary committees, the Privy Council, &c., and acting as agents before the revenue and other public boards of commissioners, and generally on behalf of such public bodies, corporations, and public companies.

“ It appears, moreover, to come within the legitimate and peculiar province of attornies and solicitors at the present day to draw and prepare agreements, wills, deeds, settlements, securities, and documents (though this was formerly considered out of their province), and also to conduct negotiations, procure and solicit loans, superintend the management of, and the letting, purchasing, and selling, of property, estates, and annuities; to collect and receive rents, debts, &c. invest and dispose of monies, and find sufficient securities for such purposes, to investigate the titles to property offered as securities or investments, make arrangements between debtors,

and creditors, and parties in numerous other relations, domestic or commercial ;—thus acting generally in the distinct characters of *procurators, negotiators, conveyancers, confidential advisers, agents, stewards, receivers, collectors, &c.*, and performing a portion of the duties anciently devolving on *scriveners*.

“ They are Officers of the Courts.—With respect to their duties in courts of justice, attornies and solicitors are, for many purposes, deemed the officers of the courts of which they are admitted, and are entitled as such to peculiar privileges and subject to peculiar liabilities, their constant personal presence in court being presumed necessary ; and, as we shall see, they are subject to a very summary jurisdiction in case of misconduct, and even for an abuse of the confidence reposed in them, by improperly advising or misleading those who employ them. Unlike other officers, though, an attorney cannot be compelled to appear or act for a suitor, unless he have previously undertaken to do so. Whatever relation, however, an attorney or solicitor stands in, as regards the courts in which he is admitted, he is, with respect to the client who employs him, regarded as an *agent*, binding the client by his acts, and accountable to him for the faithful discharge of his duties ; and he is not at liberty capriciously to abandon that client's interest, and accept a retainer against him.

“ They belong to a learned Profession.—The vocation of an attorney or solicitor is, moreover, deemed a *profession*, in the exercise of which every practitioner is expected not only to conduct himself with integrity and decorum, avoiding deceit and malpractice, but is also expected to possess a reasonable and competent degree of skill, for the want of which he is personally liable.

“ How far they are Scriveners.—Attornies and solicitors, therefore, wholly differ in this respect from the ancient *scrivener* (a portion of whose duties the modern attorney has succeeded to), the business of scriveners, both by the custom of the City of London, and as defined by the legislature, being a *trade*, and consisting in ‘receiving other men's moneys or estates into their trust or custody.’ Hence, an attorney or solicitor, unless he forsake his legitimate vocation to assume that more appropriately pertaining at the present day to bankers and bill-brokers, &c., is not liable to be made a bankrupt, or be treated in any other way as a trader ; and the business of a money-scrivener is considered so distinct from that of an attorney or solicitor, that ignorance of the mercantile value of securities is insufficient to ground an

action of negligence against an attorney ; and indeed the courts will not in general interfere in a summary way, in transactions in which an attorney has embarked in the capacity of a money-scrivener.

"In what respects their Vocation differs from that of Barristers.

—The province of an attorney has been always considered in this country, as it was in the Civil Law, to be very distinct from that of a *barrister*, both with respect to the character of advocate and that of *counsellor* ; for though, practically, attornies and solicitors do occasionally act as advocates in some of our inferior courts, and before police magistrates &c., and are commonly resorted to, in the first instance, for legal advice, and are expected to have a competent degree of skill and knowledge of the law, yet in no case, except perhaps in that of persons charged with criminal offences before justices of the peace, can attornies *demand* the privileges of an advocate, or are they, on the other hand, expected to possess a scientific knowledge of the law, which more properly comes within the province of counsel.

"Connexion between the Bar and Attorney or Solicitor.—In most of the continental states of Europe, and also in the United States of America, the profession of an advocate is constantly found united with the office of proctor, or attorney and notary. In this country, however, as under the Roman system of jurisprudence, the two functions are kept studiously distinct, it being an invariable object with the judges in Westminster Hall, as Lord Denman recently expressed it, 'that no connexion should exist between the two branches of the profession which would be likely to lead to any malpractice in either.' With a view of furthering this object, it has been held that a member of the bar cannot be either admitted an attorney or serve as a clerk or pupil to an attorney, unless he be formally and voluntarily disbarred, and this even though it was wholly from inadvertence that the application to be disbarred was not made prior to the articles being entered into ; nor can a party, after being duly admitted an attorney, and subsequently called to the bar, be re-admitted an attorney unless he be first formally and voluntarily disbarred.

"The same object, of keeping the province of the advocate, and the attorney or solicitor, distinct, has been kept in view on other occasions by our courts ; for it has been held that, even in inferior courts, where attornies and solicitors ordinarily practise as advocates, they cannot at the same time give evidence of anything which they would otherwise be in a situation to depose to in the

cause; and where the justices at quarter sessions have, to avoid similar inconveniences, made an order, giving exclusive audience to barristers, such order has been held valid, and approved of by the courts at Westminster.”

In this extract we have been obliged to omit the references, which amply support every line that we have cited. The work brings the law down to the present day, and great industry has been shown in citing almost all the recent cases. One omission however we may notice, *Howell v. Young*, 5 B. & C. 259., although cited on another point, is not given with reference to its bearing on the Statute of Limitations in an action against an attorney for negligence. We can heartily recommend this work as a most useful addition to the working lawyer's library.

NOTE (A.) TO ART. I.

It is well worthy of consideration whether, on forming a settlement in Ireland, some valuable hints could not be taken from the mode of forming a settlement in India. This was some time since suggested by Mr. James Alexander, an Irish gentleman, well acquainted with India, in a printed letter to Sir Robert Ferguson. The pamphlet was printed in 1848, and published by Fellowes, Ludgate Hill; and we understand that Mr. Alexander has himself proceeded to Ireland to carry the plan into execution. Our attention has also been called to the following account of the successful introduction of a register into St. Lucia; and we mention it with the greater pleasure because it enables us to bring to our readers' notice the name of the late Sir John Jeremie, whose labours in the cause are well known to most law reformers of twenty years' standing.

“The next abuse that occupied Mr. Jeremie's attention was the loose and irregular mode of preserving mortgages and titles to property. To remedy this evil, he recommended the establishment

a court of law. Where the Court of Chancery had made any decree or perfected any operation, the commissioners should hold themselves bound by such decree, and should have power to complete the inquiries so originated. There must be a species of concurrent jurisdiction between the commissioners and the Court of Chancery. It was necessary to determine as to which should have the priority for the purposes of the bill. If they created a special tribunal, and gave it certain high functions for those purposes, they could not render its jurisdiction effectual without vesting in it all the functions and powers necessary to the attainment of the object in view. Not only were the commissioners not to be prevented from dealing with cases pending before the Court of Chancery, but in all cases where a decree of sale had been made by the Court of Chancery and not carried into effect, they should carry it into effect. The commissioners would never act without application being made to them. When application was made to them they would have a paramount jurisdiction, proceedings in the Court of Chancery would be stayed, and it was by the commissioners that sales would be carried into effect. An appeal would be given from the commissioners, following the precedent of the West India Commission, to a judicial committee of the Irish Privy Council, to be selected by the Lord Lieutenant. It was proposed to place a restriction on appeals, giving the commissioners power to decide whether the case was one in which an appeal ought to be taken. These were the general provisions and objects of the bill. It was desirable that titles hereafter in Ireland should be put on such a footing as to prevent them from getting into the same state of complication as now existed. To make provision for that purpose formed no part of the object of the present bill, which, though temporary in its operation, would yet have generally a beneficial effect. Every acre of land sold under this commission would be held by a title which could not be questioned. It would, indeed, be a great misfortune if, after the lapse of some thirty or forty years, estates should fall again into the same state of confusion as now existed, with only this difference, that the encumbrances might be of thirty or forty years instead of sixty. It was the wish of the Government to make a change in the system of judgments, so as to prevent them from becoming a permanent charge on the land. At present, when money was raised upon property in Ireland, the judgments were registered and created a general encumbrance on the estate. That evil would be remedied by an enactment which, however, would not have a retrospective effect. The Government had also

considered whether it would not be possible to introduce an improved system of registration in Ireland. That question was still under consideration, but the measure relating to it was not sufficiently matured to allow of its introduction into the House in the course of the present session; besides, as the Commission on Registration was about to make its report, it might be desirable to wait until that document should be before the House. The feeling of Government, however, was, that it was not enough to liberate the land of Ireland from encumbrances, but that it was necessary, also, to take advantage of its freed state to prevent it being again reduced to its former condition. The great object, however, which the Government, and, he believed, the Right Honourable Baronet, who had suggested a measure of this description, had in view, was to afford an opportunity for the investment of capital which would result in the employment of labour. A wide discretion must necessarily be vested in the commissioners; they must have the power of deciding against the sale of an estate, even though application for that purpose were made, should the circumstances of the case seem to them to justify the adoption of that course. On the other hand, they would have power to sell an estate on application being made to them for that purpose, even though objection might be made by parties interested, if it should appear that the nominal landlord was unable to perform the duties which properly attached to the owner of land. Some persons might say of the present measure, as was said of the Encumbered Estates Bill last session, that it would be inoperative, and that no sales would be effected under it; whilst others might allege that it would deluge the market with land, and thereby greatly depreciate the value of that description of property, to the injury of all classes of the community. The latter evil would doubtless be guarded against by the good sense of the commissioners; and as to the other objection, that no sales would take place under the bill, there appeared to be reasonable ground for hoping that a large quantity of land would be brought into the market and disposed of judiciously. Many persons, doubtless, would be of opinion that this measure went a great deal too far; they would be shocked by the appointment of a commission, even for a short period, to supersede to some extent the functions of the Court of Chancery, and to dispose in a somewhat arbitrary manner of the property of various persons. He could only say to those persons, that the proceeding was justified by the emergency. The only mode of providing em-

fullest manner; and the Solicitor-General (to whom we cannot but think much of the merit belongs), has brought in a bill to carry them into effect. This will best be seen by some extracts from the speeches which were then made. We beg to express our full concurrence with every word uttered by the Solicitor-General. Alluding to the Irish Encumbered Estates Act, Sir John Romilly said : —

“The forms of proceeding involved much expense, and the object of the present measure was to obviate those difficulties by resorting to a course which was undoubtedly not new, which had been suggested by several gentlemen, and which had been before the Government for a considerable period; but they thought it best to create a commission, who should be able to perform the functions which had been performed up to the present time by the Court of Chancery, who should be unfettered by the rules of procedure which now existed, and who should also be able to perform their duties without the expense arising from fee, and from the antiquated system which could not be immediately removed from that Court. The present proposal was not without precedent; and there was one in a case which was closely allied, and which seemed to have succeeded; he meant the West India Commission, appointed to distribute 20,000,000*l.* of money among the owners of West India estates. They had to inquire who were the parties owners of estates, because the compensation was to be given to owners and encumbrancers according to their priority. They performed their functions not only without blame, but with the greatest possible praise, at very little expense, with very few appeals, and to the general satisfaction of those persons whose rights they had to adjudicate upon, and of the public at large. It was proposed, therefore, to appoint a commission of three paid commissioners with a secretary; that those commissioners should follow the same course with the West India Commission; that was, should themselves frame a set of rules for their guidance, to be submitted to the Privy Council of Ireland, and, when sanctioned by it, to have the same force as if they had been enacted on the part of Parliament; that the commission should have power from time to time to alter and vary those rules. First, it was proposed to lay a restriction on the commissioners that they should not frame rules by which any fees should be levied. It was further proposed that the commission should deal with applications which might be made to it within three years

from its appointment; though it would probably be necessary that it should continue for two years more. It was proposed to invest the commissioners with all the powers of the Court of Chancery in respect to the production of evidence. Where application was made by the owner or encumbrancer of an estate, they would be empowered, having made such preliminary inquiry as they might think proper, to proceed to a sale of the property in such manner and in such portions as they might judge best. With respect to the conveyance, it was proposed that the form in the schedule should be such as was usual in the conveyance of Crown lands, which, being executed by the commissioners, should vest the property in the purchaser and give him a title good against all challenge. It was proposed also that the same powers of putting a purchaser in possession should be given as if a writ of possession were executed. It would not be necessary for him to bring writs of ejectment, so that he should be put in possession of the land at as early a period as possible, with as simple a title as possible, and with a title not to be impeached. It was proposed that the money should be paid into the Bank of Ireland; that it should be divided at once among the parties entitled to a share. Questions might be raised as to the persons entitled to the property; and it would be for the commissioners to determine the rights of parties. Theoretically, though scarcely practically, it might happen that the commissioners would have to dispose of the land of some person who was not present, and of whom they knew nothing. Any difficulty on that score would be prevented by careful examination on the part of the commissioners. Though there were few good marketable titles in Ireland, all parties having interests would be ascertained, and the commissioners would be able to adjudicate so as not to dispose of the property of any person whom they had not heard. He said so with the greater confidence, because in the West India Commission, by which large estates had been disposed of, and before which numbers of claims had been discussed, he believed there was not a single instance in which parties had complained that persons having a title had been overlooked, or that money had been paid to any one to which he was not entitled. If the case, however, should occur, in the present instance, Parliament might deal with it; but it seemed advisable to exclude any provision on the subject from a bill intended to carry out measures which were generally thought essential to the regeneration of Ireland. It was necessary also that the commissioners should have power to send cases for the opinion of

of an office for the registration of deeds and 'hypothèques,' to be regulated by the law of France, and modelled, as far as practicable, on the plan of similar institutions in the French colonies. By this important reform, which came into operation on the 7th July 1829, a stop was put to that illimitable system of credit, which had proved so detrimental to the trading interests of the colony. The planter could now contemplate all the horrors of his position in the 'tableau' of his debts, and the merchant measure the extent of his embarrassment in the list of his claims. Liabilities began to be incurred with more caution, advances to be made with greater security; while the transfers of property, until then inefficient and undefined, received the sanction and stringency of legal contracts. A term of eighteen months was allowed for the registration of all mortgages then in existence, and it was enacted that every mortgage, enrolled within that period, should retain its original priority and privileged character; but that otherwise it should only take rank and precedence from the date of the enrolment.

"Nothing can more forcibly illustrate the crippled condition of the Colony than the data furnished by these registrations. Perhaps few persons out of St. Lucia may be disposed to credit the startling fact, that before the expiration of the eighteen months, the number of mortgages produced to the registrar was 1,918, exhibiting the debts and liabilities of the proprietary body at the enormous sum of 59,498,249*l.* 17*s.* 6*d.* late colonial currency, or 1,189,965*l.* sterling. There was but one possible means of rescuing the colonists from this state of unmitigated bankruptcy — the enactment of a law to authorize the seizure and sale (*saisie réelle*) of immoveable property; and in preparing the government and the country for the application of this panacea, Mr. Jeremie exerted himself with such perseverance and success, that before his departure in May 1831, he had the satisfaction to know that his views on this important subject had received the sanction of the Minister of the Crown; although it was not until January 1833, that measures were taken to give them the force and effect of a legal enactment. Soon after the promulgation of this law several estates were levied upon and brought to the hammer, and the same process has continued until almost every estate in the island has now been disposed of by judicial sale. This course, pregnant in appearance with so much misery and impoverishment, was attended in reality with little hardship to any party. There were but few whose condition could have been aggravated by being dispossessed of property, of which they had but the nominal owner-

ship; and fewer still, whose private means were absolutely restricted to the resources of the soil; while, on the other hand, the sale of the estates produced the highly advantageous results of enabling the planter to liquidate his affairs, and of throwing the estates into the hands of persons possessed of ample means to provide for their cultivation on a footing of respectability and independence.

"It was now that Mr. Jeremie's forecast began to be felt and appreciated. In the space of a few years, the sale of the estates and other property brought into circulation no less a sum than 170,000*l.* sterling, which, but for the opportune institution of the mortgage registry, must have laid in the marshal's coffers to this day. The estates might have been levied upon and sold; but there could have been no marshalling of the creditors, — no distribution of the proceeds. Nor was this the only benefit derived from the establishment of the Mortgage Office. By that were the Commissioners of compensation aided in unravelling the system of craft and confusion which had been carried on for better than half a century; by that were they enabled to adjudicate upon the claims of contending creditors, and ultimately to distribute, with such general satisfaction, the portion of the twenty million accruing to St. Lucia (335,627*l.* 16*s.* sterling). But above all, it was the creation of the Mortgage Office that, by facilitating the sale of real property, enabled the colony to assume an attitude of independence on the advent of final emancipation. This portentous change — a change fraught with embarrassment under the most favourable aspect — found the greater portion of the estates in the hands of persons in easy and even affluent circumstances, instead of finding them in the possession of a generation of bankrupts, planters of the Old School, whose passions and prejudices, fostered rather by the folly of the system than the fault of the men, had long since unfitted them for the management of willing slaves, and could have awakened but little sympathy for the intercourse of free cultivators." — *Breen's History of St. Lucia*, pp. 283—287.

Since this was written, the important debate of the 26th of April has taken place, which we can only briefly notice, but for which we must find some space. We have no ordinary pleasure in stating that the Government has adopted the views which we have always held on this subject in the

ployment for the people of Ireland was, by enabling a monied class to obtain possession of land, and the only way in which that object could be effected was that proposed by the bill, unless, indeed, the House should think proper to adopt a stronger measure, and give the commissioners power to deal with estates as the Enclosure Commissioners disposed of waste lands."

This plan was almost universally approved, more especially by the Irish Members. We give one or two points which develop more fully the plan. Mr. Keogh said —

"He understood the Honourable and Learned gentleman opposite to say that the Commissioners and the Court of Chancery were to possess a concurrent jurisdiction."

"The Solicitor-General explained that he intended the Commissioners to possess a paramount power to stay proceedings in the Court of Chancery."

Sir Robert Peel thus vindicates the conduct of the Legal Profession: —

"I should have been most unjust and ungrateful towards the legal profession if I had thrown any reflection upon them, or insinuated that — speaking of them as a body — they were unwilling to co-operate in the reform of the law. I have myself been concerned in attempts to improve the law, by a consolidation of the criminal law, and by other measures, which it has been my duty when in office to bring forward; and I am bound to say that I have found generally on the part of the profession — speaking of them as a body — the most zealous desire, at whatever pecuniary cost to themselves, to co-operate in promoting such measures. Now, without relinquishing any of the opinions which I have expressed on two former occasions, and wishing of course to reserve to myself the opportunity which the House will better have of considering this measure when it is before them, I cannot on this occasion avoid expressing my cordial satisfaction at the course the Solicitor-General has taken, and also at the general purport and principle of the measure he has introduced. I believe that, although the ordinary courts of law are admirably suited for the conduct of ordinary proceedings, and to administer justice between man and man when nothing extraordinary occurs, yet I must say that when great social difficulties have to be contended with, my belief is that you must step beyond the limits of these ordinary

courts of justice, and establish some special tribunal, unfettered by ordinary technical rules, for the purpose of solving those difficulties. I apprehend that is the course you have pursued on more than one recent occasion. Three or four years since we found all the southern counties of Wales in a state of insurrection on account of the turnpike tolls within those districts."

He then noticed the successful establishment and operation of the Rebecca Commission, the Tithe Commission, and the West India Commission.

"So in dealing with this complicated question of landed property in Ireland, I believe that by appointing some special tribunal to direct its attention to this particular subject—observing, of course all the great principles of law, and avoiding doing injustice to any man, you will best remedy the social difficulties with which you have to deal. I think the great object to be gained is to give a clear, simple, parliamentary title. To find, when you have purchased an estate, that you have bought with it a law suit, and, for any thing you know, in some cases, a duel besides, is certainly not a pleasant thing. What man would invest his capital under such circumstances? Give, therefore, a clear simple title, which will be safe against the whole world,—that is the chief thing. Give to the purchaser an assurance against indefinite charges for poor-rate, as you are about to do; give assistance by advances also,—not to the encumbered proprietor, who really has nothing beyond a nominal interest in the property, but to the new purchaser, who proves to you that he has capital, that he can repay you 4 per cent. interest upon any advance for the improvement of the land, and 2 per cent. as a sinking fund; and take care that there shall be no repudiation, that, if the advances are not repaid, the land is seized. If you give the purchaser these three inducements,—simple title, guarantee against indefinite poor-rate, and possibly his share in advances for the permanent improvement of the land, it is my belief that you will afford the greatest encouragement to persons to invest their capital in Ireland."

PROCEEDINGS OF THE SOCIETY

FOR

PROMOTING THE AMENDMENT OF THE LAW.

[Continued from 9 L. R. 448.]

[Permission has been obtained to insert the Proceedings and a selection of the Reports of the Society for Promoting the Amendment of the Law, but the Society is not otherwise responsible for the contents of this Review.]

**GENERAL MEETING, Feb. 12. 1849. — The Right Hon.
LORD BROUGHAM in the Chair.**

The Minutes of the last Meeting (the 8th of Jan. last) were read and confirmed.

The following Members were balloted for and elected :—The Hon. Arthur Kinnaird, 35. Hyde Park Gardens; S. G. Curtler, Esq., Bevere House, near Worcester; Richard Martin, Esq., Barrister, 5. Upper Church Street, Chelsea; Francis H. Goldsmid, Esq., Barrister, 5. Stone Buildings, Lincoln's Inn; James Anderton, Esq., Solicitor, 20. New Bridge Street, Blackfriars.

The further Report of the Committee on Equity on the following reference was considered :—

“That the Committee be requested to direct their valuable labours to the consideration of whether any further Alterations can be made in the whole system of the jurisdiction, practice, and constitution of the Masters and Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery.”

The 19 Resolutions on the Report (for which see 9 L. R. 447.) having been moved, the following resolutions were carried :—

1. “That the Report be received.

2. “That this Meeting being of opinion that the Resolutions from No. 2. to No. 19. would more properly form the subject of distinct Reports, declines to come to any decision upon them.”

GENERAL MEETING, Feb. 26. 1849. — M. D. HILL, Esq. Q. C.,
in the Chair.

The Minutes of the last Meeting (the 5th inst.), were read and confirmed.

Charles Pearson, Esq. M.P., Clapham Common, Surrey, was balloted for and elected.

The Report of the Committee appointed "To consider the Law of Partnership, more especially with reference to the Liabilities of Partners in Joint Stock Banks and other undertakings;" and also two Papers on the same subject directed to be read to the Society by the Committee, were presented.

It was agreed that the Report, with the several Papers annexed, should be printed and further considered at the next Meeting.

GENERAL MEETING, March 12. 1848. — Mr. Commissioner FANE
in the Chair.

The Minutes of the last Meeting (the 26th of Feb. last) were read and confirmed.

The Report of the Committee appointed "To consider the Law of Partnership, more especially with reference to the Liabilities of Partners in Joint Stock Banks and other undertakings;" and also two Papers on the same subject, directed to be read to the Society by the Committee, were further considered, and the following resolutions were proposed: —

1. "That the Report be received.
2. "That the rule of English law by which partners are unable in any case, except by the special sanction of the Government, to limit the amount of their responsibility for engagements made in the business of the firm, requires amendment.
3. "That the introduction into England of the system known as Partnership *en Commandite* — due precautions being taken against any fraudulent abuse of it — would be desirable."

It was agreed that the Report, with the several Papers annexed and the proposed resolutions thereon, should be further considered at the next meeting.

GENERAL MEETING, March 26. 1849. — JOHN ASHTON
YATES, Esq. in the Chair.

The Minutes of the last Meeting (the 12th inst.), were read and confirmed.

The Report of the Committee appointed "To consider the Law

Procureur General interfering in the daily administration of justice, and fifty other anomalies and doors to abuse, and even corruption. While we labour to amend the abuses in our own judicial system, we are bound, in fairness, to say that we have no evils so gross as those in France.

The property of the Church of England is now receiving the benefit of several inquiries, with a view to its improvement and better management. The subject is of much importance, and we propose to devote some portion of our space to its consideration.

The terms of the commission recently issued on this subject are to "inquire into the present system of leasing and managing the Real Property of the Church in England and Wales, belonging to the Archbishops and Bishops, to the Cathedrals and Collegiate Churches, and the several members thereof being Corporations sole, and to the several minor Corporations aggregate within the said Cathedrals, and also that vested in the Ecclesiastical Commissioners for England; and for considering how and by what system of management such Property can be rendered most productive and beneficial to the said Church, and most conduce to the Spiritual welfare of the people; due regard being had to the just and reasonable claims of the present holders of such property under lease or otherwise: And also for considering whether any and what improvement can be made in the existing Law and Practice relating to the Incomes of the said Archbishops and Bishops, and of the several Members of Chapter, Dignitaries and Officers of the said Cathedrals and Collegiate Churches, so as best to secure to them respectively fixed instead of fluctuating Annual Incomes."

Our readers will probably think that, in this Number, at all events, there is enough relating to the Land; but we cannot in our opinion say enough. It has become the topic of the day. Let us conclude by calling the attention of our readers to what is passing around them. This day's mail brings from Ireland accounts not only of depreciated prices in land, but depreciated professional gains, more especially, those of the bar. The most eminent members of the profession in Dublin, are represented as wandering about the Four Courts, with long faces and empty bags. Is there much difference in this respect in Westminster Hall? On the first day of this Term, two of the Vice-Chancellor's Courts were closed

after half an hour's sittings. All this appears to us, to be the inevitable consequence of the present procedure of the Court. The profession is actually looking to the act for winding up Joint Stock Companies as the only chance for the revival of business. Surely the success of this act should teach them that, if they cheapen and facilitate the practice of the Court, this is the way to increase business. In the mean time, scenes daily occur which are disgraceful to a court of justice. In the present term we have the unseemly spectacle of a conversation between a counsel and a Judge, in which both denounce and deplore the practice of the Master's Office and the hourly warrant system; and the Judge (one of the few men of genius now in that Court) finds he can only grumble. Three months ago, rumours were rife of intended alterations; but as yet they rest on rumour. To no one, and we say it with unfeigned respect, would we so readily commit the necessary reforms as to the present Lord Chancellor, whose searching, practised, and powerful mind could grasp the whole subject; nay, to no one is the cause so much indebted; for his orders of 1841 showed that he understood the nature of the disease, which they did much to remedy; but it is not doing justice to his own measures to postpone them to the end of the session, when they cannot be fully appreciated or sufficiently discussed. Let us hope that the approaching month of May will not be allowed to expire, without the promised reforms making their appearance.

Easter Term, April 27.

NOTE (B.) TO ART. V.

SINCE this article was printed Mr. Ewart has, following up his question, given notice (24th April) that he will move, on the 8th of May, for the following returns : —

“Return of copies of any Reports made by or to the Benchers of the Middle Temple, or any Committee appointed by them on the subject of Legal Education in November 1845.

“Of any examinations of Students for the degree of Barrister-at-Law which have taken place at the Middle Temple in consequence of any such Report or otherwise.

“Of any prizes or rewards, or exhibitions given by the Society of the Middle Temple to Students at Law in consequence of such Report or otherwise. Showing what measures have been adopted by the Inns of Court in pursuance of the Minutes agreed upon as the result of the conferences of the deputations from the Committees of the Inns of Court on the subject of Legal Education, approved June 3. 1846, and printed in the Appendix to the Report of the Select Committee on Legal Education.

“Return of any orders or rules made by the Benchers of any of the Inns of Court on the subject of the examination of Students, and attendance on Lectures to each by any of the Inns of Court from the year 1841 to the present year 1849 inclusive.

“And as to any prizes or exhibitions given by the Benchers of the Inns of Court to any Students of the Inns of Court during the same period.”

The motion for these returns will bring on the whole question, and the Inns of Court are placed in this dilemma. If these returns are granted they will prove to the public the vacillating (to give it no harsher term) conduct which they have pursued. If the returns are resisted on the ground of their relation to private property, on what ground can the

Inns of Court justify their right to admit Students at Law, and to call to the Bar? As the friends of a searching, complete, and temperate reform of the Inns of Court, we could not wish the question to stand better than it does.

POSTSCRIPT.

It gives us sincere pleasure to announce that the French National Assembly has, though by a discreditable small majority, adopted M. Montalambert's motion, and taken the wise and honest course of making the judges irremovable. We lately had occasion to show how fraudulently that Body had acted in pretending to make judges irremovable, but confining the operation of that law to those after named; so that all the many hundreds already in judicial office held their places during pleasure. This enormity is now done away with—after a zealous opposition from a person who once degraded the high office of Minister of Justice—M. Cremieux.

The Assembly is now in the agonies of dissolution. Its movements, like those of other parties in such circumstances, are convulsive, and exhibit alternate violence and exhaustion. But for this late Act, which has been forced on it by fear and by shame, it deserves to have many transgressions covered. The object probably of M. Montalambert is to attract popularity towards the Evangelical party, which he leads with much zeal, considerable eloquence, and no judgment. But when a man undertakes to handle a great question, he ought, in common decency, to learn the A, B, C of it. And what profound ignorance of jurisprudence, French and foreign, did the Count display, when he had the hardihood to pronounce that "*Europe envied the French system of judicial procedure!*" It is, with the solitary exception of the Court of Cassation, one of the very worst in all the civilised world. Its 2,500 superior judges receiving the wages of artisans or petty shopkeepers, many of them paid no better than servants out of livery; and all of them supposed to job in any line of local and party politics, form a system on which all Europe looks down with absolute contempt—to say nothing of the anomalous office of

of Partnership, more especially with reference to the Liabilities of Partners in Joint Stock Banks and other undertakings ;” and also two Papers on the same subject directed to be read to the Society by the Committee, were further considered, and it was resolved,

1. “ That the Report be received.

2. “ That the rule of English law by which partners are unable in any case, except by the special sanction of the Government, to limit the amount of their responsibility for engagements made in the business of the firm, requires amendment.

3. “ That the introduction into England of the system known as Partnership *en Commandite* — due precautions being taken against any fraudulent abuse of it — would be desirable.”

GENERAL MEETING, April 4. 1849. — DAVID POWER, Esq., in the Chair.

The Minutes of the last Meeting (the 26th March), were read and confirmed.

The Report of the Committee appointed “ To consider what improvements, if any, may be made in the present system of Law Reporting, and generally on the mode of Publication of Law Works,” was presented ; and it was agreed that the Report should be printed and further considered at the next Meeting.

GENERAL MEETING, April 23. 1849. — Lord BROUGHAM in the Chair.

The Minutes of the last Meeting (April 4th), were read and confirmed.

The Report of the Committee on Law Reporting was received.

THE LAW REVIEW.

ART. I.—THE LAW OF ARBITRATION.¹

I THE subject of Arbitration is one of great and increasing importance. As a method of settling disputes, it is at the present day often sanctioned with judicial approbation. In questions relating to compensations and others of a like nature, modern acts of parliament frequently prescribe it as the sole remedy, or leave a claimant to have recourse to a jury or to an arbitrator, at his option. In certain cases the benefit of referring to arbitration instead of going to law, is too apparent to be disputed. Opinions may differ as to the extent and number of the instances in which arbitration is properly applicable; but all will admit that the whole value of this method of obtaining justice depends upon the award being a final settlement of the matters in difference. Now it is not so easy a matter, as some persons are apt to imagine, to make an award that is safe from impeachment. Unprofessional arbitrators often fall into sad mistakes, and even gentlemen very learned in the law are sometimes caught tripping. A lamentably long list of cases in which awards have been set aside, will be found in the Law Reports. Indeed, so large a portion of the treatises on arbitration does the title of "Setting aside Awards" occupy, that an ignorant

¹ We are glad to avail ourselves of this opportunity of calling the attention of our readers to a "Treatise on the Power and Duty of an Arbitrator, and the Law of Submission and Awards," by Francis Russell, Esq., M. A., Barrister at Law. It appears to us a complete, elaborate, and accurate production; and, as being the last work on the subject, is entitled to great attention; and especially as the power of arbitration has been so much enlarged by many recent statutes, which are referred to and provided for.

person might at first sight be inclined to imagine that awards were made as much for the purpose of being set aside as for that of being enforced. Now, when it is considered that setting aside an award implies as a consequence that justice is grievously delayed if not defeated; that a great deal of expense, trouble, and anxiety has been fruitlessly incurred; and that all the litigated questions are to be fought over again, the honoured maxim of Magna Charta, *Nulli vendemus nulli negabimus aut differemus justitiam vel rectum*, will occur to one's mind as conveying a sort of protest against the propriety of such a state of things, and induce one to look round for a remedy. It is true that miscarriages in the course of legal proceedings are not confined to arbitrations. Nonsuit and new trial are terms familiar to every ear; sometimes, indeed, we see irremediable wrong inflicted under cover of the law. But as it is the duty of every good citizen to assist in perfecting that part of our institutions with which he is more peculiarly conversant, let us, confining our attention to the Law of Arbitration, see if we cannot point out some of the causes of failure in the case of awards, and also, at the same time, suggest a plan by which they may be considerably removed.

1. A slight investigation into the practical proceedings with regard to arbitrations, will, it is hoped, induce a concurrence in the following observations: — The powers and duties of an arbitrator depend chiefly on the express terms of the submission which confers his authority; and as these terms may be varied indefinitely according to the will of the parties to the reference, the clauses and provisions which are inserted in submissions are very various; hence the powers and duties of arbitrators differ much in particular instances. The consequence is, that a decision of the Courts in one case will often form no safe guide as to the course to be adopted by an arbitrator in circumstances apparently similar, some clause which is inserted in one submission being omitted or altered in the other. Moreover, without great care an arbitrator may fall into the error of supposing the two cases analogous.

Another evil is found to arise from the absolute freedom of the parties in fixing for themselves all the terms of the

reference: — *they leave out most important provisions.* Their attention at the time of entering into the reference is frequently wholly directed to a consideration of the points which shall be submitted to the arbitrator, and to the extent of his power over the subject matters; sometimes both parties are ignorant that any other points need arranging; at other times the superior intelligence of one party enables him designedly to exclude certain clauses; but the result is, that they often omit to insert working clauses for the proper conduct of the reference, for the prevention of delay, or for curing technical defects in the award; and the want of such clauses is only found out too late when some practical difficulty arises, and the Courts of Law with regret are obliged to set aside the award.

“ *Ibi omnis effusus labor.*”

For an award set aside is of no use on earth, and ought (if Milton be correct as to the destiny of things transitory, vain, and abortive) to be consigned to the Limbo or Paradise of Fools. Instead, however, of transportation to this rather distant region, the sentence on awards, which have thus come to an untimely end, seems at the present day to be commuted to perpetual imprisonment in the pages of a Law Report, thence to be brought forward from time to time, for the edification and warning of other parties and arbitrators.

But, it may be asked, how can a remedy be applied without infringing on that which is the essence of all arbitrations, the free and voluntary agreement of the parties? The practice of the courts of *Nisi Prius* will furnish an answer. The officer of a court of *Nisi Prius* keeps by him printed or lithographed forms of orders of reference. These contain all the formal parts of an order of the court, and also all those working clauses which experience has proved to be generally beneficial. These working clauses are called the “usual terms.” On a cause being called on for trial, which it is deemed more convenient for an arbitrator to decide than a jury, a discussion frequently takes place between the parties, their counsel and attorneys, as to the extent of the questions to be referred, and as to particular special limitations; but when

these are arranged, the reference as to every thing else is sure to take place on the "usual terms." The order of reference is then drawn up by filling in the blanks in the prepared form, and adding the special provisions, if any. On all the circuits and in all the Courts of Common Law, these orders of reference at *Nisi Prius* contain substantially the same terms, and nearly in the same words. Hence, without violating any freewill of individuals, the Courts give the parties the benefit of the wisest known provisions, though the parties really are not conscious of the boon.

But may not this principle of preparing beforehand terms of reference for the assent of the parties be carried further? May it not be extended to every reference over which the Superior Courts of Law or Equity at Westminster have cognizance, whether held under judges' orders, rules of courts, orders of Chancery, or agreements of reference containing a clause for making them rules of court? Is it not possible to select general terms of universal application, to which in almost every case the parties would be ready to agree? Surely it would be very advantageous to have one uniform set of rules in all cases. A judicial interpretation would soon be put upon them. The labours of the judges would be much lightened. New clauses requiring interpretation would be of rare occurrence. Instead of having as now frequently to put a construction on some provision peculiar to an isolated case (as on some badly drawn will raising a point interesting only to the legatees,) the Courts, in deciding on any general clause, would be establishing a useful precedent for all future cases, and the tribunals of law and equity would unite in framing one uniform code for the guidance of parties and the enlightenment of arbitrators. The result would be that the probability of substantial errors would be greatly removed, trivial mistakes would be easily corrected, and all just awards would become nearly unimpeachable.

Now it has suggested itself that these desirable objects might be in a great measure effected by an ACT OF PARLIAMENT which, after setting forth at length the best general working clauses of reference that can be selected, should enact

that the parties to every reference within the act shall be deemed to have agreed to these clauses, as if embodied in their respective submissions, except so far as by their submissions they reject or alter them.

The principle of such a legislative enactment is not new. It has already been adopted by Parliament with advantage in the Lands, Railways, and Companies Clauses Consolidation Acts, and in many others still more recently. Indeed, the Statute of Distributions, which points out in whom the personal property of an intestate will vest, in fact embodies the same principle. For, as a man has the power of making a will, and so of precluding the operation of the statute, he may reasonably be deemed to have agreed to its provisions, if he makes no will, or, so far as he makes a will, which does not fully dispose of his whole property.

Great care and judgment would of course be necessary in selecting the standard terms of reference, which should be stated in the clauses of the proposed bill. In many of these clauses the very language of familiar provisions should, as far as possible, be used. There are, however, several cases in which it is suggested the substitution of new provisions would be advantageous. Let us consider some of them separately, showing what is the evil to be cured in each, and explaining the proposed cure or alleviation.

2. Perhaps the greatest departure from the ordinary provisions of an agreement of reference which we would venture to advise, would be contained in the section which should specify the period within which the parties should be deemed to have agreed that the award should be made. So strong are the objections to which the present mode of limiting the time is open, that we may be fully justified in proposing a new system when we are considering how a model set of terms should be drawn up. The crying evils of determining matters by arbitration are the expense and the delay. Delay almost inevitably causes expense. If long intervals occur between meetings in the reference, the matter is at times half forgotten; a considerable portion of a meeting is often spent in refreshing the memory as to what took place at a previous meeting; facts are proved two or three times over

in the course of the reference from mere forgetfulness of the past; and questions of law once decided are sometimes re-argued and re-determined, and possibly in a different way, the second time. Every one of any experience in trials at Nisi Prius knows, that when one or two witnesses have fully proved the whole particulars of the transaction in question before the jury, the other witnesses to the same transaction are often dismissed with but a very few questions, bearing only on the very gist of the inquiry. But on a *reference*, when the statement of the former witnesses, made probably a month or two before, has greatly faded from the memory of all, the examination and cross-examination of the subsidiary witnesses (if they may be so termed) is likely to be as long as that of the chief witnesses who have already deposed to the whole facts. There does not seem to be any practicable method of reducing expense by diminishing the fees or charges. Whatever the particular party who has to pay may think, the cost of counsel, attornies, and witnesses, for an attendance before an arbitrator, is not excessive. It is the *number* of attendances that swells the amount of costs. The only mode therefore of reducing the expense seems to be, by preventing, as far as possible, the delay between the meetings. Now, as the law stands at present, when the submission fixes no time for making the award, or gives the arbitrator a power of enlargement, as is usually the case, the time allowed to the arbitrator is practically unlimited. He knows this, and the parties know it too. The result is, that too often the arbitrator, the attornies, and even the party who feels confident of success, make a practice of postponing the claims of the reference on their attention to those of any other business which presses in the least. A meeting, say they, can easily be put off, the reference can come to no harm from waiting. In many cases an arbitrator is thought harsh, and counsel are indignant, if, even at the petition of one of the parties, the arbitrator compels attendance at early meetings and forces a speedy disposal of the case. And yet unnecessary delay is often a denial of justice. The credit and solvency of a trader or merchant may depend upon his obtaining the money due to him before

a certain day; and ten times the sum paid afterwards may not compensate for the want of it to satisfy particular engagements.

Enacting that the award shall be made within a definite period, though one obvious mode of preventing delay, will not, it is apprehended, be a satisfactory course. By the French law¹ indeed, the space of three months, by the Scotch law² the space of one year, is the period limited to the arbitrator, when the submission is silent as to the duration of his authority. In both these countries, however, the provision is intended to meet an exceptional case; they contemplate that generally the parties will settle the time in the submission. But the design of the proposed amendment of the English Law of Arbitration is to save the parties the necessity of thinking on the subject, and to frame a rule adapted not to the exceptions, but to the great mass of arbitrations. Hence it does not seem advisable to adopt the mode of fixing a definite period, for it can hardly be thought right to prescribe one uniform limit as applicable alike to all references. Moreover, experience shows that there often is an inconvenience in fixing a limit at all; unforeseen difficulties occur, so that the award cannot be made in time. So strongly has this inconvenience been felt, that the legislature has thought fit to enact that the Courts may enlarge the time, even although the parties have limited it to a certain day.³ We may therefore assume that both reason and experience point out that there should be some means of suiting the length of the time to the necessities of the case.

The remedy we suggest, to prevent as far as may be the evil of delay, and at the same time to allow full opportunity for hearing the case, is the following—that the proposed statute should enact *that the parties shall be deemed to have agreed that the arbitrator's power of making an award shall expire if he neglect to proceed and hold a meeting within a certain limited period from his appointment, or from the last previous meeting.* The section should also permit *the court or*

¹ Code de Procédure Civile, s. 1007.

² Taylor v. Grieve, cited 5 Dow. 256.

³ 3 & 4 Will. 4. c. 42. s. 39.

a judge to revive the arbitrator's authority when expired. A proviso might be inserted to prevent the time running in certain cases, as, for instance, during the examination of witnesses abroad under the powers subsequently proposed to be given. The arbitrator should no longer have any power of enlarging the time.

If such a provision ever shall become law, the effect we calculate will be, that meetings in references will be held at shorter intervals, and that, instead of a tendency to delay, there will be a tendency to proceed with and finish the case off-hand. The arbitrator will no longer be allowed to sleep over the matter, for he will be unwilling that his power should lapse, and the party who hopes to succeed will be sure to press him on for fear of a lapse occurring. Mere prudence will teach the arbitrator not to run the time too close, for fear of being compelled, for the purpose of saving the statute, to hold a meeting at some time when it will be peculiarly inconvenient. Formal meetings may no doubt in some cases be held with a view of evading the act, but this could not very easily be done except by consent of both parties; and supposing it possible in some cases, the arbitrator would at the worst have no more power of delay than he has at present. The only evil that suggests itself as probable is that of the time lapsing accidentally; this, however, could be cured by consent of parties, or by the power reserved to the court of reviving the authority of the arbitrator. Opinions probably will differ much as to the time to be fixed as the periodical limit. Some suggest one month: we, however, are inclined to give the greater latitude of three. This we think will be sufficient to break the tendency to delay without involving too violent a change in the common course of proceedings in arbitrations. We have already observed that nothing in the proposed statute should prevent the parties from having the power of fixing in the submission any period, either long or short, that they might think proper.

3. Most of the other clauses to which the parties should be deemed to have agreed would be in substance the terms of reference ordinarily in use in orders of *Nisi Prius*. Thus the parties should be deemed to consent *that the death o 1 a*

party should not revoke the submission, and that the arbitrator might proceed *ex parte* after notice. As usual, certain costs should be made to abide the event of the award, while other costs might be left to the discretion of the arbitrator. The arbitrator should also have power to state a case in the award, and to say what should be done by the parties respecting the matters referred. The parties should be deemed to agree to abide by and perform the award, not to bring any writ of error or any action or suit against each other or against the arbitrator respecting the matters referred, and to pay costs for wilfully preventing an award being made.

4. We would also add to these consent clauses that the parties should be deemed to have agreed that the reference of a cause should be a stay of proceedings in it pending the reference — that where there shall be two arbitrators an umpire should be appointed by them, or, in case of their not agreeing, by the master — that a majority of the arbitrators, when more than two, should be competent to act — that after peremptory notice, the arbitrator should be at liberty to make his award at once — that he should have power to enforce the production of any document or chattel in the control of the parties, and to enter on their lands for the purposes of the reference — that he should have authority to amend the record and proceedings, and to direct an entry of a verdict in indictments and informations referred as well as in actions, — to award judgment in an action whenever a verdict could not be awarded or entered — and where there were several arbitrators, that they might execute the award apart from each other.

5. These consent clauses we would introduce in sections commencing, "And be it further enacted, that the parties shall be deemed to have agreed that," &c. The effect of this mode of enacting would be that the terms of reference and the powers of the arbitrator, as far as these clauses are concerned, would be left as before the statute, dependent on the agreement of the parties. This we think would be better than enacting absolutely that the arbitrator shall have such and such powers, since an arbitrator, with positive statutable powers, would probably be found to stand, especially with regard to third parties, on a very different footing

from one who derived his authority solely from the consent of individuals. Of course the act should expressly provide that the parties might, by their submission, use other terms of reference, which, so far as they were inconsistent with the consent clauses of reference set out in the act, should override and be substituted for them. We shall presently have to consider some provisions over which we would not allow the parties to have any power.

6. And now let us pause for a moment and consider, what will have been effected, supposing a bill, containing such a system of consent clauses, when perfected by experience, to have become the law of the land. The business of settling satisfactorily the terms of a reference, a matter at present beyond the power of unprofessional persons, which taxes the best energies and skill of attorneys, and requires the greatest caution of counsel, will no longer be one of such anxious consideration. The statute will have relieved them from all care as to the terms of reference. Unless there be some great peculiarity in the case, the parties will have merely to agree on the matters to be referred, and the name of the arbitrator. Thenceforth, in agreements of reference, in orders of Nisi Prius, in rules of Court, in orders of Chancery, it will be sufficient to state that it is agreed or ordered by consent that the cause, suit, or other matters be referred to Mr. A. B. All the rest will be implied. The long series of powers and provisos which usually follow, or ought to follow, in these agreements, or orders, may be omitted. Counsel, attorneys, parties, and arbitrators will know, or will readily learn, what ought to be done in the prosecution of the reference, — there being only one rule, and that of universal application, and the best that can be adopted.

II. The above-mentioned design of making, as it were, a statutable agreement of reference suited to every case, though a leading object of our proposed Arbitration Act, should not, we think, be by any means the sole point to which the attention of the Legislature should be directed. We will endeavour to show that such an act might with

advantage be framed so as to embrace many other important particulars.

The benefit of an alteration of the law as to these will be more shortly and conveniently considered in connection with the specific suggestions for amendments, to which attention is accordingly invited.

1. Now we will venture, in the first place, to propound that it would be desirable to have one general arbitration statute, applicable, as far as may be, to every ordinary reference to arbitration.

There are, indeed, several acts of parliament providing for the settlement by arbitrators of particular questions,—as, for instance, of disputes between masters and workmen in trades and manufactures, or of questions of compensation for lands taken for public undertakings: with these acts we do not propose to interfere. But there are two general enactments relating to arbitration to which we would call attention. The first of these was passed in the reign of William III. That statute, after reciting that references by rule of court had contributed much to the ease of the subject in determining controversies, because parties were obliged to submit to the award under penalty of imprisonment for contempt of court, proceeds to enact, that when persons insert in their submission to reference an agreement that the submission shall be made a rule of one of the superior courts, the submission in such cases may be made a rule of court; and if any party neglect to obey the award, he shall be liable to the penalties of contemning a rule of court. It also provides for setting aside awards summarily, when obtained by corruption or undue means.¹ The other enactment is the Act for the further amendment of the law passed in the time of King William IV.² In three sections of this act provision is made to prevent parties, without leave of the court or a judge, from revoking the authority of the arbitrator,—for giving power to the court to enlarge the period for making the

¹ 9 & 10 Will. 3. c. 15.

² 3 & 4 Will. 4. c. 42. ss. 39, 40, 41., re-enacted as to Ireland by the 3 & 4 Vict. c. 105. ss. 63, 64, 65.

award, — for enforcing the attendance of witnesses, — and for empowering an arbitrator to administer an oath.

The statute of William III. is limited in terms to the settlement of matters for which there is no other remedy than by personal action or suit in equity; and it has been held that a reference by bonds of submission of an indictment for an assault with all other matters in dispute, is not within the statute.¹ The clauses in the act of William IV. are, it seems, confined to references by agreement under the previous statute, and to references in an action at common law. Vice Chancellor Shadwell seems to think that the arbitration clauses of the statute of William IV. contemplate proceedings at common law only; and he refused to make an order under s. 39., to compel the attendance of witnesses before an arbitrator to whom a suit in Chancery had been referred by order of Chancery.²

It is also very questionable, whether, on a reference of an indictment at Nisi Prius, the statute of William IV. has any application, as such a reference is not a reference either by agreement under the statute of William III. or in an action. Thus it will be seen that the only two general statutes on the subject of arbitration are of *partial* application.

To remedy this the more convenient course would be to *repeal them altogether, and then to re-enact, with the necessary alterations, such portions of them as it should be deemed advisable to retain, extending their operation to all references within the statute.* This would leave the proposed act the sole general statute relating to arbitration, and therefore properly entitled to be called "The Arbitration Act."

2. The Act itself should specify to what submissions it should apply. Without attempting an exact definition, we should propose that it should embrace all references of an action by Judge's Order, or Order of Nisi Prius, or Rule of Court, all references of a suit by Order of Chancery, and all submissions to be made Rules of Court by virtue of the Act. Probably it should be extended to Orders of Reference of the Courts of the Counties Palatine of Durham and Lancaster.

¹ *Watson v. McCullum*, 8 T. R. 520.

² *Hall v. Ellis*, 9 Sim. 530.

We entertain doubts whether the machinery of the Superior Courts could be brought to bear beneficially on references from the County Courts, or from the Court of the Stanneries, or from Borough Courts of Record. To some classes of submissions, parts only of the act might be made applicable. For instance, any new provisions for the procuring evidence, or the examination of witnesses, or the remitting awards to the arbitrators, might be beneficially extended to the case of arbitrators under the Lands, Railways, and Companies Clauses Consolidation Acts without at all affecting the scope of those statutes.

3. The provision of the Act of William III. for making an agreement of reference a rule of court should of course be re-enacted, but not, we think, without alterations. That statute only applies where there is an *express clause* in the agreement of reference stating the consent of the parties that it should be made a rule of court. When such a consent is not contained, any party to the reference is at liberty to revoke the authority of the arbitrator at any time before the award is made. The arbitrator cannot lawfully administer an oath to the witnesses; the attendance of the latter cannot be compelled; and the summary modes of enforcing the award have no application. Now it seldom happens that persons when they enter on a reference are desirous of being so circumstanced. Their object is to have a searching inquiry and a final settlement of the matters in dispute. But it often occurs that the consent clause is left out of the agreement of reference by accident; and then, whichever party feels the case going against him is almost always sure to take advantage of the omission to defeat, as far as he can, the original purpose of the arbitration.

Now in order to provide for making agreements of reference rules of court, and also to prevent the inconveniences hitherto found to arise from the accidental omission of the consent clause, we would propose that the new clause should in substance enact, *that unless the contrary were expressed in the agreement of reference, the parties should be deemed to have agreed that the submission might be made a rule of court, and that when the submission contained no clause, or failed to specify the court, the party who was the first to move to make it a rule*

of court, might select which of the Superior Courts he should choose for that purpose.

4. The bill recently introduced into Parliament by Mr. Baines, concerning Courts of Quarter Sessions, embodies another alteration which we were prepared to submit for consideration as part of a general Arbitration Act,—*namely, the extending to Courts of Quarter Sessions the power of making Orders of Reference which are afterwards to be made rules of the Court of Queen's Bench.*

A provision of this nature is recommended by the following considerations. Questions of great nicety and complicated accounts,—as for instance, respecting the rating of railways, or appeals under local Acts of Parliament,—often come before a Court of Quarter Sessions. It is frequently felt that an arbitrator is more fitted to decide on these accounts than a bench of magistrates. It is perceived that one award can conveniently consolidate many appeals and raise questions as to the merits of all for the opinion of the Court of Queen's Bench. But at present a Court of Quarter Sessions can do no more than adjourn a case from time to time for some one to make a report to them upon it. Their referee has none of the powers of an arbitrator under a reference by Rule of Court; there are no means of enforcing attendance before him, or the production of documents; he cannot administer an oath to the witnesses; all must be purely voluntary.

Our present design will not permit us to criticise the terms of the arbitration sections of Mr. Baines' bill; but we cannot help calling attention to sect. 12. of his bill, which enables parties, after a notice of appeal shall have been given, to enter into a private agreement of reference respecting the subject-matter of the appeal. Our inclination would be to strike out this clause altogether. It admits, we think, of serious doubt whether parish officers and parties interested should have the power of affecting the rights and interests of the parishioners and other parties in so extensive a manner, except under the control of the Court of Sessions. It cannot, surely, be expedient that two farmers, churchwardens of parishes disputing respecting the burden of maintaining a pauper family, should have the power of referring the deci-

sion to a third farmer, and that his award, made probably without proper means of investigation, should have the effect of a judgment of the Court of Sessions, quashing or confirming the order of justices. It cannot practically be satisfactory to allow any private individual, without the express sanction of the Court of Quarter Sessions given with a full knowledge of the circumstances, the power of sitting in judgment on the acts of justices and others, in the performance of their public duties and adjudging on public rights. Giving the Court of Sessions power on application to order a reference, if the case seems to them proper for such a mode of decision, will, we suggest, meet all existing evils.

We would also add, that in matters of public interest it is not every one that is qualified to be an arbitrator; and that as the Legislature has prescribed that in cases of differences between counties and boroughs respecting the expenses of prisoners in gaols, the arbitrator to decide them shall be a barrister; so it would be expedient to enact *that in cases referred by the Sessions the arbitrator or one of the arbitrators should be a barrister or justice of the peace.*

5. *A like power of making orders of reference which are ultimately to be made Rules of the Court of Queen's Bench, might, we suggest, be satisfactorily given to Courts in which indictments or criminal informations for certain misdemeanors of a private character, or informations for penalties, are pending.*

For it is often desirable that an indictment or information of a private nature, as for an assault or a libel, should be settled by arbitration. When, for instance, a charge is made that a certain business is a public nuisance, or that a high road is out of repair, a mere decision of guilty or not guilty often cannot dispose fully of the equities of the case. The mode of carrying on the business—a nuisance in law—may be so altered as to prevent private or public inconvenience. An arbitrator alone who has power to say what shall be done, can authoritatively and skilfully prescribe the necessary steps to preserve the public from injury without ruin to the individual. Another reason for alteration arises from the present condition of the law, on the subject of referring indictments. . . If an indictment has been found, it is doubtful how

for it can be validly referred by agreement out of Court¹; it has been decided that such agreement of reference cannot be made a rule of Court.² To effect the submission safely, it must be removed into the Court of Queen's Bench; in which case it may be referred either by rule of Court, or, as is very common, by order of *Nisi Prius* when it has been sent down for trial. Even then, however, it seems doubtful, as we have before seen, whether any of the salutary provisions of the statute of William IV. apply so as to prevent a revocation, to allow of an enlargement of the time, or to make compulsory the attendance of witnesses.

Informations stand very much on the same footing as indictments; and if the consent of the Attorney-General be made requisite to the reference, as is the case with regard to informations in Chancery, every reasonable guard against any abuse of the new provisions would, it is trusted, be obtained.

6. In deeds of partnership and other instruments made between private individuals, there are often inserted clauses, such as Mr. Cobden says ought to be inserted in all treaties between nations, providing, that if any disputes arise, they shall be settled by arbitrators appointed by both parties. Certain questions, in the case both of individuals and of nations, may undoubtedly with great propriety be submitted to arbitration. But whatever success may be expected in inducing hostile communities to have recourse to arbitration instead of war, it must be confessed, that in private life the parties have often exhibited great reluctance in applying to the tribunal provided by themselves, and considerable difficulty has been felt in enforcing these arbitration clauses. The law has in some instances exhibited a sort of jealousy of any interference with her prerogative of deciding disputes. She has said that she will not allow herself to be ousted of her jurisdiction by any agreement of the parties, and Chancery has refused a discovery on the plea that it is beneath her dignity to be ancillary to the domestic forum of an arbitrator. But when a party has chosen to enter into an agreement to refer,

¹ *R. v. Rant. Kyd on Awards*, 64.

² *Watson v. McCullum*, 8 T. R. 520.

we think that in all proper cases the other party has a perfect right to compel him to perform it.

This power we would give by inserting a section which should enable the Courts, if they should please, to stay all proceedings respecting matters on which the arbitrators might be called upon to decide, and should give to either party a power of forcing on the reference by appointing the arbitrator selected by himself to act as sole arbitrator, if the other party, on proper notice, refused to nominate an arbitrator on his part.

7. Some new powers as to the reception of evidence might, it is apprehended, be vested in the arbitrator with advantage. It is submitted that it would be advisable to insert a section empowering an arbitrator to receive evidence either *vivâ voce* or by affidavit, or upon interrogatories, as he might think fit, unless the submission expressly restrained his freedom. Affidavits, however, ought not to be forced upon him: it might therefore be enacted that he should in the first instance certify his willingness to receive them, and then that the Courts, commissioners for taking affidavits, and justices at home, and consuls abroad, should be empowered to take the affidavits; these the arbitrator should be at liberty to receive or reject, and to act upon or not, at his discretion.

The grounds of this proposed enactment are the following:—In different classes of cases different modes of taking evidence will probably be deemed most suitable. Generally, of course, preference will be given to *vivâ voce* examinations as a means of eliciting truth. But in Chancery cases it may often be thought expedient to admit evidence taken on interrogatories. At present, if the submission directs the witnesses to be examined on oath, an arbitrator on a reference at common law is not justified in receiving evidence by affidavits.¹ But many cases may arise in which an affidavit would answer all the ends of justice. Suppose the admission in evidence of a document is objected to merely for want of the attesting witness being called, there being no imputation of any irregularity in the execution, why should not the arbitrator be at liberty to say that on an affidavit of the due

¹ Banks v. Banks, 1 Gale, 46.

execution he would admit the document, and thus save the necessity of bringing the witness perhaps from Cornwall or Northumberland to prove a fact really not in dispute? In like manner the formal proof of many other matters might, it is suggested, be thus satisfactorily obtained at far less cost and trouble than at present. It might surely be left with safety to the discretion of the arbitrator to decide what parts of the case he would allow to be proved by affidavits, and what weight he would attach to them. The danger of a failure of justice, if such a practice were allowed before a jury, might, it is true, in some cases be great, because at *Nisi Prius* the case must be decided at once off hand on the evidence produced; but on a reference, time is allowed for consideration, parties will have the opportunity of sifting the statements in an affidavit, and if a case be made out even for cross-examination, the arbitrator, pursuant to the proposed enactment, might say, "I will not rely on this affidavit; I shall reject it; you must call the witness." In many cases the receiving the affidavit would but be shifting the burden of calling a particular witness from one party to the other: thus the arbitrator might state: "Though I shall receive this affidavit tendered on the part of the plaintiff, you the defendant can bring up the deponent as your witness to prove your case if you think fit."

8. Another point deserving attention is, whether some provision ought not to be made for taking the evidence of persons residing out of the country. We think it would be beneficial to give facilities for that purpose. We would therefore propose to enact *that it should be lawful for the court which has cognizance over the submission, on receiving the certificate of the arbitrator that the evidence of certain persons abroad was necessary for the ends of justice, to order an examiner abroad to take their examination and return it to the arbitrator.*

This would be a new provision in the case of arbitrations. But it would be in reality merely an extension of the power which at present exists in the case of an action or suit of issuing a commission for the examination of witnesses. If disputes have arisen between a firm in London and their

correspondents in Jamaica, India, or Russia, and an action or suit is commenced in the courts of Westminster, the witnesses resident abroad may be examined on a commission; but if, from the complication of the accounts and the conflicting nature of the claims, the matter be referred to an arbitrator as most fitted to do complete justice, there are, according to the present state of the law, no means of making the evidence of the foreign residents legally available before an arbitrator who remains in England. There does not, it is suggested, exist any good reason why the same facility which exists in actions and suits as to witnesses abroad, should not be extended to arbitrations. With regard to witnesses resident in England, it does not seem necessary to give any power to appoint examiners. The Courts, indeed, require a power of taking the evidence of persons who cannot attend, even though dwelling in England, for the court cannot wait on them: but an arbitrator cannot reasonably complain if in the rare instances where the evidence of a bedridden or infirm witness in England is required, and an affidavit will not be sufficient, he should be forced to go to the dwelling place of the witness, to take down his testimony in person.

9. Some other points in which legislative interference might be beneficial will be briefly noticed. For instance, it would, we think, be expedient to insert an enactment to *relieve the arbitrator from awarding on specific issues in the action referred, unless particularly required*. Such a clause would but follow a suggestion often thrown out from the Bench: it has, moreover, frequently been embodied in orders of reference.

10. Greater effect might, we think, with propriety be given to awards in some particular cases. Thus, following the analogy of the statute 1 & 2 Vict. c. 110. s. 18., which gives to rules of court for payment of money the effect of judgments, we would recommend that the act should provide *that a rule of court to deliver possession of lands pursuant to an award should have the effect of a judgment in ejectment*. This would enable the party to obtain immediate possession. At present an action of ejectment to recover possession may

be necessary, if the party, against whom the arbitrator decides, choose rather to go to prison than deliver possession of the lands in dispute. Some have recommended that an award, deciding the title to land, should by statute be made to have the effect of a conveyance, as an award often has under an Inclosure Act; but it is apprehended that there would be great difficulties in carrying the recommendation satisfactorily into general practice.

11. It is a question deserving consideration, whether by means of arbitrations some facilities might not be afforded to the settling of claims regarding the estates of deceased persons, and some relief given to executors and administrators in the discharge of their responsible duties. As the law now stands, executors have to get in all the estate of the deceased with due diligence, and to pay the debts in a certain order, according to the nature of the securities of the particular creditors. An executor is hardly ever safe from personal responsibility, if he enter into any compromise with a creditor or a debtor of the deceased. For even should there be a clause in the will, specially enabling him to refer or compromise claims, such clause could not protect him against creditors, supposing it to relieve him as regards legatees. Administrators, too, in the present state of the law, have obviously no protection. Hence a personal representative runs the risk in general of having to make good out of his own pocket any deficiency occasioned by what a jury may deem an unwise compromise. Yet if a creditor bring an action against the executor or administrator, to recover any claim for debt or damages against the deceased, and the creditor obtain a verdict, or the defendant choose to confess the action, or allow judgment to go by default, the judgment entered up for the amount recovered may be pleaded or given in evidence as settling the amount of the debt, and covering so much of the assets, so as to defeat any other creditor's inferior claim, and the correctness of such judgment as to amount cannot be impeached, merely because another jury should entertain a different opinion as to the extent of the claim on either side; but it would seem that there must be something almost amounting to fraud or collusion, to justify reopening the accounts ap-

parently settled by such judgment. The decision of a competent arbitrator, which in many cases is held equivalent to a judgment, might, it is suggested, without violating any principle of justice, be held equivalent to a judgment in the case of a personal representative. It often happens that a person may have a claim against a testator, or a testator against another party, or there may be cross claims; and the amount of such claims may not be readily ascertainable, but may depend upon questions on which an arbitrator can decide with peculiar propriety, and the executor, and the party to save the necessity of proceedings in law or equity may be willing to submit the claims to arbitration; and yet the executor may be deterred from doing so, from the certainty that as regards third parties the award would settle nothing; that the amount awarded would not, even *primâ facie*, be taken to be the true amount, and that he would personally be liable to make up any supposed deficiency in his accounts.

Thinking these considerations justify an attempt to give greater effect to awards for the relief of personal representatives, we venture to propose the insertion of an enactment, *that an award ascertaining the amount of any such claim, or the balance of any such claims, should, in any question as to the amount or distribution of assets, have the same effect as a judgment or decree; and when against the executor, as a judgment or decree for the payment of the amount of a debt by simple contract out of the assets of the deceased.* It is probable, if such a clause became law, an arbitrator would set off against each other claims not strictly grounds of legal set-off. As, for instance, claims for unliquidated damages against a debt, or an equitable claim against a legal liability; but such a course could not be objected to as inequitable by third parties.

Again; at law an executor may, by the course of his defence to an action, incur a personal liability for the debt and costs, or for the costs only. Now if he admits that he is executor, and in possession of assets, his course of defence before the arbitrator can hardly be such as to render an award which has the effect of a judgment *de bonis testatoris* an insufficient decision for the claimant. Since having admitted assets, if

the testator's goods be insufficient, his own must make good the amount awarded. With respect, therefore, to costs, the clause might go on to enact, *that the arbitrator should have power, unless expressly restricted by the submission, to award whether the costs, if any, which the executor should pay, were to be paid out of the assets or out of his own goods.*

Thus it is hoped an easy and satisfactory method might be obtained of ascertaining and settling all separate money claims concerning the deceased's estate, whether in law or equity, at the same time that the executor would have this great advantage, that the award, so far as he was personally concerned, could not be impeached, except for the same reasons that a judgment in law, or a decree in equity, could be invalidated by third parties.

12. With respect to setting aside awards, it would be expedient that the principles should be the same in "all the courts, and that the practice should be made as uniform as possible." This it would not be difficult to effect. The most valuable term for preventing technical objections to awards introduced into modern orders of reference is that *which gives the court power to remit the award back to the arbitrator.* The act should embody such a provision in a specific clause, but we think, without, as heretofore, making that power dependent on the consent of the parties; for no principle of natural justice seems to require their consent, or renders it unjust to leave in the hands of the court the sole discretion as to whether the award ought to be wholly set aside or sent back to be amended by the arbitrator.

13. In the foregoing pages we have endeavoured to sketch the outline of a GENERAL ARBITRATION ACT. Our limits will not allow us to develop the details. Recapitulating the whole, its proposed effect may be stated shortly thus— all the general statute law of arbitration would be consolidated into one act— many new Courts would have the powers of making orders of reference— all arbitrations would be placed on nearly the same footing— one general set of terms of reference would be established applicable to all cases, without any trouble to the parties— new powers for obtaining evidence from persons at home and abroad, would be vested in the ar-

bitrators and the Courts — new facilities would be afforded for settling claims concerning the estates of deceased persons or the possession of lands — and greater efficacy and security would be given to awards.

14. We fear that we have exhausted our reader's patience upon this rather dry subject. But we plead in our excuse that there is a peculiar fitness in discussing it at large at the present time. For it is to be observed that many of the most important Acts of Parliament passed within the last few years contain each a series of arbitration clauses, differing in some respects from each other; and if we may judge from the Bills introduced into Parliament, and the tendency of modern legislation, every great and comprehensive statute affecting property is likely to have its own separate provisions for arbitration. This, therefore, is the time to consider whether this separate system should be continued. Enough has already been seen of the working of these arbitration clauses, to show how imperfect they are in many cases; but time has not yet been allowed for any evil practice to become inveterate. Now, if there was one General Arbitration Act, such as we have suggested, the new statutes would be framed with regard to it; their special provisions concerning arbitration would be very much simplified, and references under them being held on the terms of the Arbitration Act would have all those advantages likely to arise from a well drawn submission and from uniformity of practice, which we have previously put forward as the principal reason for passing such an act.

ART. II.—PRENDERGAST'S LAW OF THE ARMY.

The Law relating to Officers in the Army. By HARRIS PRENDERGAST, of Lincoln's-Inn, Esq., Barrister-at-Law. Parker, Furnivall, and Parker, Whitehall.

MR. HARRIS PRENDERGAST has here presented us with a useful book, on a new subject, and in a new manner. We have elsewhere, in this Volume, stated our views as to the necessity of some alteration as to the mode of publication of our legal literature. The folios and quartos of our ancestors have been displaced by the octavos of the present day; and here we have a smart duodecimo, in which the law on the subject to which it relates is collected in a very attractive form. We would willingly see more books such as this, in which the information is presented in a shape perfectly intelligible, not only to the legal advisers of the class to which it relates, but to the class itself. Every officer of the army will do wisely if he forthwith possess himself of this little volume; and, by a diligent perusal of it, he may save himself from some most serious scrapes, as we conceive there are many occasions in which he will stand in need of good legal advice in some of his most ordinary duties. Let us give a few illustrations of this.

As to attending a general meeting of officers:—

“A regimental officer, who holds a detached military command at a distance from his own regiment, will not, by the disbanding of the regiment and his own reduction to half-pay, become *ipso facto* disqualified for the retention of such command, or liable to be superseded therein by the officer next in seniority, as on the occasion of a death or other acknowledged vacancy. His army rank is, in the estimation of the law, and according to military usage, a continuing rank; and he is still a military man, entitled, as before, to compel obedience to his own orders at the post intrusted to him.

“This was exemplified in the case of *Bradley v. Arthur*, before the Court of King's Bench in 1824. Major Arthur, of the

7th West India regiment, was appointed, in 1814, by the Duke of Manchester, then Governor of Jamaica, to be His Majesty's Superintendent of the British Settlement of Honduras. At the same time Major A. received from General Fuller, Commander-in-Chief of Jamaica and its dependencies (of which Honduras was one), a commission in the following terms: — 'I do hereby constitute and appoint you, the said George Arthur, to command such of His Majesty's subjects as are now armed, or may hereafter arm, for the defence of the settlers of the Bay of Honduras. You are, therefore, as commandant, to take upon you the care and charge accordingly.'

"In 1817, Major A. was appointed Lieutenant-Colonel of the York Chasseurs, which regiment was disbanded in 1819; of this fact he had notice on or before the 24th August, in that year. He continued thenceforward to act as commandant of Honduras. In May, 1820, Lieutenant-Colonel Bradley, on full pay of the 2nd West India regiment, was at Honduras; and thinking that Lieutenant-Colonel Arthur, by the disbanding of the York Chasseurs, was become incapable of further exercising military command, and that the command had in consequence devolved upon himself, as the officer next in rank, refused to obey an order issued by Lieutenant-Colonel A. for assembling all the officers in Honduras at Government House, and issued a counter-order, for the officers to assemble at Lieutenant-Colonel Bradley's own quarters at the same hour. Lieutenant-Colonel Bradley having absented himself from the meeting at Government House, Lieutenant-Colonel Arthur thereupon caused him to be arrested for disobedience, and for presuming, without authority, to take the command of the troops and issue garrison orders.

"These proceedings having been reported to General Walker, then Commander-in-chief at Jamaica, were by him communicated to the home authorities, and Lieutenant-Colonel Bradley was dismissed the service. Lieutenant-Colonel Arthur returned to England in 1822, and shortly afterwards an action for illegal arrest and imprisonment was brought against him by Lieutenant-Colonel Bradley, for the purpose of trying the question, whether or not he was entitled to assume the chief military command at Honduras on the disbanding of Lieutenant-Colonel Arthur's regiment, or, in other words, whether or not Lieutenant-Colonel A. was the superior officer at the time of his arresting Lieutenant-Colonel Bradley. But upon this point the Court of King's Bench gave judgment in favour of Colonel Arthur. Lord Chief Justice Abbott: — 'It

does not appear to be questioned that at the time when the defendant received his appointments, whatever their nature might be, from the Duke of Manchester and General Fuller, he was a person capable of receiving an appointment to a military command. Indeed that could not be disputed, because he was then an officer holding a command in His Majesty's army on full pay. If, then, he was capable of receiving military command at that time, the next point is, was any military command given him? He was appointed by the Duke of Manchester to be superintendent, which is considered a civil appointment; at the same time General Fuller, who then had the command of the troops on that station, gave him that appointment upon which so much observation has been made. By that he was to take upon him the command of all persons armed, or to be armed, for the defence of the settlers. We must consider that it was intended to give him the supreme military command, as connected with the civil superiority conferred upon him by the Duke of Manchester. There being, then, nothing in any Act of Parliament, or in the Articles of War, to show that a person well appointed in the first instance shall lose his authority as soon as it may happen that the regiment in which he held a commission is disbanded, I think that the authority must be considered to have continuance until the Crown thinks proper to put an end to it. The defendant's authority at Honduras had no connection with his situation in the regiment. No part of the regiment was stationed at Honduras; and if we were to hold that the disbanding of the regiment put an end to his authority, it must put an end to it immediately, and then the greatest mischief would arise; it would, for some time at least, remain uncertain who was to take the command; and if he continued in command, as he would do, until the notification of the fact of disbanding, every act he might do in the interval would be void. The mischief and inconvenience of that would be so great that, unless we are informed by some fixed proposition of law that, having authority to hold such an appointment, his authority ceased upon the disbanding of the regiment, the argument must fail. It appears to me, therefore, that having been well appointed in the first instance, his authority continued, notwithstanding the disbanding of the regiment, until it was the pleasure of his Majesty to put an end to that authority, by appointing some other person, or withdrawing this officer. Nothing of that kind was done.'

"It appears, also, from the foregoing case, that the usage of the army in matters of rank and command is recognized as a test by

the superior courts of Westminster; and that, in order to ascertain such usage, the evidence of distinguished and experienced officers, and particularly of those who have filled high posts in the military departments of Government, is receivable, and entitled to very high consideration." (Pp. 40—43.)

As to arranging the resignation of a superior officer with a view to succeeding him:—

"Occasionally, however, the resignation of a superior officer is brought about by an arrangement, under which his successor is to allow him still to enjoy a proportion of the salary or emoluments of the rank or station from which he retires. But unless the consent be first obtained of the heads of the department to which the patronage of the office belongs, such a transaction is, if possible, more illegal, even at common law, than a simple payment of money, or an annuity to procure a resignation. For the reason of giving a salary is, that it is supposed to be necessary for enabling the holder of an office duly to execute the duties; and where the policy of the law in this respect is violated by private agreement, unaccompanied by superior sanction, the arrangement is deemed a fraud upon the public, and cannot be sustained in any court of justice.

"In the Excise Case already cited, Lord-Chancellor Talbot pronounced against this practice a solemn opinion in the following terms: 'The taking away from the officer what the Commissioners of the Treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion.'

"In 1790 the subject was much considered by the Court of Common Pleas in the case of *Parsons v. Thompson*, where an officer in the royal dockyard at Chatham agreed to give another officer there a certain share of the profit of the office, if the latter would allow himself to be superannuated, and retire on the usual pension to make way for the former; and it was decided that such an agreement having been made without the knowledge of the Navy Board, to whom the appointment belonged, could not be the foundation of an action, because it was contrary to public policy. The case was assimilated by the court to commissions in the army; and the practice respecting the sale of them was adverted to, as resting on the consent of those who have the power of granting them. Lord Loughborough, C. J.: 'Every action on promises

must rest on a fair and valuable consideration, which it is for the plaintiff to make out. What is the consideration stated here?—that the plaintiff represents himself as unfit for future service, and entitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true, there was no ground for any bargain with the defendant; the plaintiff did nothing for the defendant; all he did was for his own ease and advantage. If false, the public is deceived, the pension misapplied, and the service injured. It is not stated that the plaintiff procured the appointment for the defendant (which would clearly have been brokage of office and bad), but that he *made way* for the appointment. But from thence no valuable consideration can arise. Had the transaction passed with the knowledge of the Admiralty, judging of the case, and applying at their discretion the allowance they are bound to make, possibly it might have stood fair with the public. I say *possibly* only; to be sure the ground of deceit on the public would be done away. But this case rests on a private unauthenticated agreement between the officers themselves, which cannot admit of any consideration sufficient to maintain an action. This agreement resting on private contract and honour may, perhaps, be fit to be executed by the parties, and can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise; but legal obligations are, from their nature, more circumscribed than moral duties.

“These principles were adopted by the Court of Chancery in another case, of which the leading facts were as follows:—Edward Hartwell was appointed in 1776, by the then Postmasters-General, Lord Le Despenser and the Right Honourable H. F. Thynne, to the command of the *Dartmouth*, a king's packet, running between Holyhead and Dublin, in succession to his father, Joseph Hartwell, the former commander, and on the recommendation of friends, with whom Edward Hartwell had stipulated, that, if they obtained for him the appointment, he would make a suitable allowance towards the support of his mother and sisters. He accordingly gave a bond, securing an annuity for that purpose. His appointment, however, was made by the Postmasters-General unconditionally, and without any reference to the arrangement above stated; they being, in fact, totally uninformed respecting it.

“The annuity was in arrear at the death of Edward Hartwell;

and a suit in Chancery was instituted against his executors to recover the amount. The Master of the Rolls, Sir Richard Pepper Arden, (afterwards Lord Alvanley,) heard the cause, and after adverting to *Parsons v. Thompson*, where the agreement was without the knowledge of the Navy Board, his Honour proceeded thus :—‘I have, therefore, no scruple in saying, that if such a contract is made for a sum of money in consideration of the appointment to such a command as this, between individuals, and it is not completely with the knowledge of the Postmaster-General, it is void.’ His Honour also intimated his opinion, that the transaction could not stand, even if proved to be concluded with the approbation of the Postmaster-General.

“ Lord-Chancellor Thurlow, in the year 1781, proceeded on the same principle, in a case where Lord Rochford, Groom of the Stole to King George III., had, by virtue of his own office in the King’s household, recommended another person to a place in the household, in consideration of an annuity to be granted by the new placeman to a third person. Lord Thurlow held the contract to be illegal; and restrained, by an injunction, an action which he had brought to recover some arrears of the annuity.

“ But the common law of the land, upon which the foregoing decisions rested, has been partially modified by the stat. 49 Geo. III. c. 126. s. 10., which authorises the grant of an annuity to be reserved out of the fees or emoluments of an office to the former holder, *provided the amount, and the circumstances and reasons under which the arrangement is permitted, be stated in the instrument appointing the successor*, by whom the annuity is to be paid. It will be observed, however, that the language of the act is confined to the former holder of the office, and does not authorise a grant to his wife or children, or to a stranger. The silence, therefore, of the statute with respect to all persons, except the former holder of the office, supports to some extent the conclusion, that every other transaction of the nature under consideration is legally void and unsustainable. And it will be further noticed, that the bargains legalised by the statute are such only as are effected with the direct cognizance of the board, or other party having the right of patronage or promotion, who is also to state the whole matter in the instrument or commission, under which the new officer receives his appointment.

“ In a modern case, where the bargain involved the purchase of the command of a ship in the maritime service of the East India Company, and the resignation of the present commander, under a

secret stipulation for his continuing to enjoy a portion of the emoluments of the appointment, the Lord Chief Justice Abbott made the following observations bearing upon the subject under consideration:—‘Had the East India Company known that the effect of appointing [Captain ———] would not be to give him the emoluments of the office, but to divide them between him and others, it is probable that the Company might have exercised their right of patronage in a different manner. Such a secret agreement would, therefore, be a fraud upon the Company.’

“Applying the foregoing rules and principles, therefore, to military commissions in the Company’s service, where the purchase of such commissions is unknown to, and unauthorised by, the law, the Lord Chief Justice Abbott’s judgment, in the last cited case, is a direct authority for the proposition, that all pecuniary dealings between officers in that service, for promotion or succession by means of the resignation of their superiors, are offences against the statutes of King Edward VI. and King George III., unless such bargains be in each individual instance accompanied by an official signification of the consent and approbation of the Company. For the Company are entitled to a free, impartial, and disinterested course of succession and promotion among their officers; and practices of this nature, if suffered to exist in one corps, operate prejudicially to other corps in which such practices are not known. Under any circumstances, and however general the practice may be, the Company are by such secret proceedings deprived of the power of regulating the promotion of their officers, in the manner or according to the terms upon which they enter the service; and this encroachment upon the Company’s rights constitutes an offence against the Government of which the Company is a part.

“As to those corps, therefore, in the Royal army in which promotion takes place only by succession, the result is, that where an officer for a pecuniary consideration makes way, by his retirement, for the admission or promotion of another, the transaction is illegal and void; and it makes no difference whether the money paid is in the form of a gross sum or an annuity, or whether the payment is effected out of private funds, or secured by a charge upon the future emoluments receivable by the officer who gets the benefit of the vacancy.

“The like law must obviously apply, in equal degree and in every particular, to the East India Company’s military service, where succession by seniority is the rule of promotion. It is, therefore, perfectly clear, that all those transactions, which are

understood to be of frequent occurrence in the various corps of that service, for inducing the retirement of senior officers by pecuniary considerations, are utterly illegal and void in themselves, and expose all parties, without exception, who are concerned in such transactions, to a prosecution for misdemeanour before the Supreme Courts in India, or the Court of Queen's Bench at Westminster, as circumstances may require." (Pp. 58—63.)

These extracts will show that the perusal of this volume may be of great advantage to officers and others connected with the army, and may save both their pockets and their reputations. They may learn the principal subjects treated of by the following mention of the titles of the chapters: 1. The Legal Constitution of the Army. 2. Admission to the Service. 3. Home and Foreign Enlistment. 4. Rank. 5. Sale and Purchase of Commissions. 6. Pay, Half-pay, and Pensions. 7. Prize and Booty. 8. Liabilities for Private Injuries. 9. Criminal Liabilities. 10. Liability on Contracts. 11. Privileges and Disabilities. 12. Discharge from the Service. On all which subjects Mr. Prendergast has not only diligently extracted from the law reports and statute book all useful matter, but has also swept the whole range of modern literature for materials and illustrations, and has certainly produced a most practical, readable, and useful work. He has been assisted as to the selection of topics and the mode of treating them by his brother, a distinguished officer on the staff of Lord Gough; and he has, besides this, if we mistake not, an hereditary right to be well informed on the general subject; and we are satisfied that this work will, as soon as known, not only be consulted as a safe authority by his professional brethren on the matters to which it relates, by no means of unfrequent occurrence in practice, but become the pocket companion of all officers in the army who wish to be well-informed as to their duties or their rights. We shall conclude this slight notice by an extract from the chapter on the Constitution of the Army, which is a good illustration of the style of the whole work:

"Military law is totally distinct from martial law. Military law affects only the troops or forces to which its terms expressly apply, while martial law extends to all the inhabitants of the

country or district where it happens to be in force. Military law is a code of previously defined regulations: whereas martial law is wholly arbitrary. By its very nature it originates in emergencies, and is regulated by the expediency of the moment. Military law is in operation during peace as well as in war, but martial law emanates entirely from a state of intestine commotion, or hostile war actually raging in the scene of its administration. Martial law always accompanies troops in the field on foreign service; but it ceases on their return within the jurisdiction of civil or municipal tribunals actually exercising their functions. Military law, on the other hand, consists with the general undisturbed administration of the civil or municipal law, as is constantly exemplified by the sittings of courts-martial in garrisons and harbours within the realm during profound peace.

“ ‘Martial law,’ says the eminent Lord Chief Justice Hale, ‘is not in truth and reality a law, but something indulged rather than allowed as a law: the necessity of government, order, and discipline in an army, is that only which gives these laws a countenance. *Quod enim necessitas cogit, defendit.*’ This definition by Sir Matthew Hale will be well followed by an extract from the judgment of the Chief Justice Lord Loughborough in the case of *Grant v. Sir Charles Gould*.

“ ‘Martial law, such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons in all circumstances. Even their debts are subject to inquiry by a military authority. Every species of offence committed by any person who appertains to the army is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases not relating to the discipline of the army in those states which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as cases within the cognizance of military authority.

“ ‘In the reign of King William III., there was a conspiracy

against his person in Holland, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in England, but the conspirators were tried by the common law. And within a very recent period, the incendiaries who set fire to the docks at Portsmouth were tried by the common law. In this country all the delinquencies of soldiers are not triable, as in most countries of Europe, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law courts. Therefore, it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain.'

"Thomas, Earl of Kent, being condemned at Pontefract, 15 Edward 2., by martial law, his attainder was reversed, 1 Edward 3., because it was done in time of peace. And it is laid down, that if a lieutenant, or other that hath commission of martial authority, doth in time of peace hang, or otherwise execute, any man, by colour of martial law, this is murder, for it is against Magna Charta.

"The case of the celebrated Irish patriot, Theobald Wolfe Tone, furnishes a modern instance of the interference of courts of law to prevent the irregular application of martial law to the offence of high treason, at a time when those tribunals were in the full exercise of their ordinary jurisdiction. Tone was one of the prisoners taken on board the *Hoché*, in the disastrous expedition of the French to Ireland, during the period of the Great Revolution. At first he passed unnoticed among the officers; and when they landed at Letterkenny, he was invited with them to a breakfast with the Earl of Cavan. At the breakfast he was recognised, handed over to the police, and sent off to Dublin to be tried for high treason. As soon as Tone arrived in Dublin, preparations were made for trying him by a court-martial. Mr. W. Tone, in the account he gives of his father's trial, says that an erroneous notion prevailed, that his father considered his French commission as a protection; but that 'he knew perfectly well that the course he had deliberately taken subjected him to the utmost severity of the British laws.' But in Tone's own journal for March 1796, he himself says, 'I was willing to encounter danger as a soldier, but had a violent objection to being hanged as a traitor; consequently I desired a commission in the French army: as to the rank, that was indifferent to me, my only object being a certainty of being treated as a soldier, in case the fortune of war should throw me into the hands of the enemy, who I knew would otherwise show

me no mercy.' Certainly if we may judge from his own confession, he appeared at that time to think that a French commission would be a kind of safeguard, at least that it would entitle him to a soldier's death; though in his journal of December 25th, 1796, he seems not quite so sure of this result; for he says, 'perhaps I may be reserved for a trial, for the sake of striking terror into others, in which case I shall be hanged as a traitor.'

"On Saturday, the 10th November, 1797, the court-martial assembled. It was composed of General Loftus, Colonels Vandeleur, Daly, and Wolfe, Major Armstrong, and Captain Curran; Mr. Paterson was Judge-Advocate. Tone appeared in the uniform of a *chef de brigade*; he pleaded guilty to all the charges brought against him, and endeavoured to justify his political conduct in a very eloquent and affecting speech. He ended by requesting to die the death of a soldier, in consideration of the uniform which he wore. He then handed in his commission from the French Directory, signed by the Minister of War, granting him the rank of *chef de brigade*, and a letter of service, giving the additional rank of adjutant-general. The Lord Lieutenant, the Marquis Cornwallis, did not think fit to accede to his request, and he was sentenced to be hanged on the 12th November. Meantime his friends were not idle. Mr. Curran contended that the sentence was illegal, inasmuch as Tone, not being a military man, could not legally be tried by a court-martial, while the Court of King's Bench was sitting, as martial law must cease so soon as civil law is re-established. He, therefore, on Monday morning, the day fixed for the execution, moved the Court of King's Bench for a *habeas corpus*, directed to the provost martial of Dublin barracks and Major Sandys, to bring up the body of Tone. The Chief Justice Lord Kilwarden, immediately sent the sheriff to the barracks to stay the execution while the writ was preparing. The sheriff speedily returned with the answer of the provost martial, that he must obey Major Sandys, and with the answer of Major Sandys that he must obey Lord Cornwallis. At the same time, Mr. Tone's father, who had gone off with the writ of *habeas corpus*, returned, saying that General Craig had refused to obey it. On this the Chief Justice ordered the sheriff to take the body of Mr. Tone into custody, to take the provost marshal and Major Sandys into custody also, and to show the order of the court to General Craig. When the sheriff again returned, it was only to inform the Court of King's Bench that Mr. Tone had cut his throat during the previous night, and could not be removed. The matter was of course then dropped; but

the opinion of the Court of King's Bench was clearly manifested on the subject. Tone, not being a British soldier or officer, was not subject to the military articles of war which governed the British army; and the courts of common law being then in full exercise of their powers, martial law was wholly inapplicable to his case.

"In accordance with this view of the subject, that accomplished jurist, Sir James Mackintosh, thus expressed himself: 'While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer; every moment beyond is a usurpation. As soon as the laws can act, every other mode of punishing supposed crimes is itself an enormous crime.'

"At the time of the Irish Rebellion, in 1799, martial law had been successfully exercised in restoring peace, so far as to permit the course of common law partially to revive; but as rebellion raged in some particular parts of the kingdom, a special act (39 Geo. 3. c. 2.) was passed by the Parliament of Ireland, to enable the Lord Lieutenant to punish rebels by court-martial. Sir James Mackintosh remarks upon this statute, as being the most positive declaration, that where the common law can be exercised in some parts of the country, martial law cannot be established in others, though rebellion actually prevails there, without an extraordinary interposition of the supreme legislative authority itself.

"The principle of the last-cited Act of Parliament is further illustrated by the Irish Coercion Act passed in 1833, during the administration of Earl Grey. Martial law was there expressly authorised to be established in certain districts, to be for that purpose proclaimed by the Lord Lieutenant; and so long as the proclamation remained in force the ordinary course of justice in criminal matters was suspended.

"In former times the annual introduction of the Mutiny Act, which now passes as quietly as any turnpike-road bill, was a regular opportunity for patriots to declaim against a standing army and military government. But as the maintenance of an army without military laws and courts-martial for holding officers and men to their duty, was obviously a practical absurdity, this theme of patriotism has died away; so, on the other hand, officers and soldiers are still regarded as fellow-citizens of the people, actuated by the same feelings, and ready not only to defend the country

against foreign aggression, but to protect the constitution, instead of combining to overturn it.

"The employment of the troops to quell civil riots and disturbances, has frequently been brought forward and commented upon, as an attempt to introduce *martial* law and military government. But this view of the subject is wholly inapplicable to an army constituted like that of Great Britain, and has often been exposed by the most dignified constitutional authorities." — (Pp. 7—13.)

The author's view of the constitutional footing of the army as an imperial institution, in Chap. I., is not quite complete, inasmuch as all notice of the Irish Mutiny Acts is omitted.

In Ireland, before the incorporating union with Great Britain, the military constitution was on a different footing from that of England. Until the year 1779 the Irish military establishment was regulated by the Mutiny Act, annually passed by the British Parliament. But in that year the Irish Parliament, then struggling for independence, transmitted to England, for the approbation of the Privy Council, according to the usage of the time, the draft of a bill corresponding to the Mutiny Act of England. The Ministry introduced an amendment rendering it perpetual; and in this form the Irish Parliament passed the Bill. The result was the creation in Ireland of a permanent standing army, under the uncontrolled direction of the executive government.¹

In p. 138. it is stated that the cases showing an officer's liability to an action for injuries occasioned by negligence or unskilfulness in the performance of his duties, are to be found only in the Admiralty Reports. The author has not carried his researches far enough. A case illustrating the responsibility for injuries thus resulting to other military men, conjointly employed, is to be found in Hobart.

In *Weaver v. Ward*² the case was, that the plaintiff and defendant were both soldiers of the trained bands of London. While Ward's band was skirmishing, by way of military exercise, with their muskets charged with powder, against another trained band to which Weaver belonged, Ward's

¹ Miller's History Philosophically Illustrated, book iv. chap. 16.

² Hobart's Reports, 134. A. D. 1616.

musket was discharged in such a manner as to wound the plaintiff, who thereupon brought an action of trespass against Ward. The defence made by Ward was, that he was in training by order of the Lords of the Council, and skirmishing in obedience to military command; and that the injury happened casually, by misfortune, and against his will. But this was decided not to be enough. *Per Curiam*: "No man shall be excused of a trespass except it may be judged utterly without his fault. As if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as that it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

The Common Law Reports also abound in cases where public officers have been sued for injuries occasioned to third persons by an improper or negligent exercise of official powers.

ART. III.—INTERNATIONAL LAW.

PART II. *continued.*

Of the second component Part or Branch of International Law, usually called the Conventional Law of Nations, its Nature, Extent, or Limits, distinctive Character, and Records.

HAVING in our last article on this subject, endeavoured to illustrate the basis, nature, distinctive character, and development of the first great component part or branch of the law of nations, namely, General, Common, Consuetudinary, International Law, and noticed its evidence or Records, we now proceed to the other great constituent part or branch of the law of nations, namely, Particular Conventional International

Law, established by public treaties between two or more states. And it seems to have been contended, that the doctrine we propounded, in our first article, in tracing the third source of International Law, is exceptionable, inasmuch as, if it does not deny the existence, it does not correctly estimate the value, narrows the limits, and does not recognise all the effects of Conventional Law. A simple perusal of what is stated in tracing the third source of International Law, is sufficient to show, that, instead of denying the existence, we recognise the validity, and great utility, occasionally, of the Conventional Law of Nations. But the other objections, it may be proper to examine and discuss more minutely and profoundly. And in doing so, it may be proper to consider the juridical nature of contracts, between individuals, as recognised and enforced in the Internal Law of States, or Private Civil law, as well as between Independent states, usually denominated Public Treaties; noticing, particularly, the limits in point of duration, and the legal effects, or consequences, of such Private contracts and Public treaties. In this way, we may probably find, we shall be able to show, that we have done ample justice to Conventional International Law; and that various modern jurists have gone too far, in holding it to have, or involve, a legislative force beyond the consent of parties, and to afford evidence or proof of a sort of general consuetudinary International Law, which it does not by any means prove, but in reality usually disproves, by showing it is itself an exception from the general rule previously followed in practice.

To begin with private contracts in the internal jurisprudence of states, it is not perhaps, altogether clear, whether the rule, *Pacta sunt servanda*, which is the foundation of all such contracts among individuals in civil life, as well as of all international treaties, although apparently long recognised as such, be really a *first truth*, and not resolvable into a more simple element. Some jurists hold, that contracts are legally binding, because each contracting party, by his promise or engagement, excites reasonable expectations of performance, and authorises the other party to make arrangements accordingly; therefore is not entitled to disappoint these expecta-

tions, and thereby occasion loss or damage to the other party; reparation, or indemnification coming in the place of performance or fulfilment, when that has become impracticable. Other jurists hold, that contracts are binding, because each involves the transference of a juridical power, or right, over external substances, moveable or immoveable, or over the actions of other persons, and invests the opposite contracting party with the power of exercising that right, or at least deprives the promiser or undertaker of any farther disposal of the powers so transferred or alienated. Other, still later jurists, such as the German authors Krug, and Hegel, hold, "that as soon as the contract is completed, namely the promise or engagement has been accepted, the twofold, or double wills, of the promiser or undertaker, and of the acceptor grow, or become, one will; to which the parties having power to do so, have subjected themselves as the rule of their future actions; which rule, reason must recognise as valid, as long as the contract is unfulfilled, that is, until what has been promised, be performed or executed."¹ The philosopher, Kant, while he does not approve of the deductions of the jurists, prior to his time, rests the legal validity of contracts upon a postulate of practical reason; which, as Warnkoenig observes², translated into common or ordinary language, means nothing else than that the interest of right or justice, and of the social life of men, requires absolutely, or indispensably, that contracts be declared legally obligatory.

These views of different jurists certainly explain, some in a more, others in a less satisfactory mode, the grounds, or reasons, why contracts should be held legally binding, and physically enforced. But, as stated in our former article, this inquiry seems scarcely necessary; for the rule *Pacta sunt servanda* always appeared to us to be intuitively apprehended and instinctively felt; that is, to be equivalent to one of the First Truths of Buffier, or as an ultimate fact, in our nature, to fall under the Common Sense of Dr. Reid, and of

¹ See Warnkoenig, Rechts-philosophie, 1839. p. 374—379. § 176.

² Warnkoenig, p. 379. See also Austin's Province of Jurisprudence determined, p. 365.

Professor Dugald Stewart, as correctly and profoundly expounded by Professor Sir William Hamilton, Bart., in his recent publication, which he calls the "Philosophy of Common Sense;" resting, in short, upon the same or a similar basis or foundation, as our belief in the existence of the external world, and in the ordinary course of nature. And without aiming at any further simplification of the basis on which Conventional International Law reposes, we willingly recognise the legal principle of *Pacta sunt servanda*, in its broadest sense, and to its full extent, to be liberally construed, as a *Contractus bonæ fidei*, and as nearly, if not absolutely, co-ordinate with the legal principles, *Neminem lædere, suum cuique tribuere*.

As these observations, of course, do not aim at anything like a complete system, or theory, such as Dr. Wheaton's work on International Law, but are merely intended to correct some views, which appear to us to be erroneous, but which seem, of late years, to have become more prevalent, and more extensively diffused on the Continent, we do not deem it necessary, that in farther considering the Juridical Nature of Contracts, either private or public, we should inquire into the mode or means, by which they may be effectually entered into and concluded, — what are their general effects, or the rights and obligations thereby created, — and how they are terminated by fulfilment or otherwise. The only two points to which, on the present occasion, it may be proper to attend, seem to be the influence or effect, which contracts may have on third parties, or persons not included in the contract, either as principals, or by accession; and whether a contract be an act of such a juridical nature, as to become the foundation of a general or Common consuetudinary law, and as to indicate by its frequent long continued and uniform repetition, a decided conviction in the mind of the people or nation, that the rule which has thus been usually observed is the legal rule, resulting from the observed existing juridical relation, and, therefore, ought to be enforced.

Now, with regard to the first point, it does not appear to have ever been maintained, in the private jurisprudence of states, that any person is bound by a contract, unless

he has given his consent, either expressly, *totidem verbis*, or by acts clearly inferring such consent; or that any two persons can, by their contract, impose an obligation upon, or even bestow or establish a right or beneficial interest on, a third party, except in so far as they are concerned, and bind themselves. Any further investigation of this point, therefore, seems to be superfluous; and it only remains to inquire, whether contracts, private or public, be of such a nature, in their character of acts, as to become the foundation and proof of a sort of vague and general, or Common consuetudinary law. But to avoid repetitions, and to place the matter in a stronger light, by comparison or contrast, we shall delay the discussion of this point, till we have considered a little more minutely the nature of Public contracts, or Treaties among nations.

Defects in Conventional Law of Nations.

In our former article, and in the preceding observations, we conceive we have done, as we are quite disposed and indeed bound in duty to do, ample and complete justice to Conventional International Law.

But, while we have, both formerly and now, admitted the validity and operation, and great utility in many cases of Conventional International Law to its full legitimate extent, we must protest against any attempt to enlarge its boundaries, in the manner which appears to us to be implied in or indicated by the vague and rather ambiguous language employed by Martens and Klüber. In this our apprehension—in the interpretation we have thus put upon the expressions just alluded to, we are assured by M. Ortolan we are quite mistaken; and certainly, that author, in the 5th chapter of his first volume, does not venture to lay down any other doctrine than what we maintain,—namely, that treaties are binding only on those nations who consent and become parties to them, according to the sound and fair construction of their terms, for the specified or otherwise ascertained period of their endurance, and when not terminated by supervening circumstances and events. But, whether he is correct in the assurance he thus gives, and with what consis-

tency he subsequently adheres to the general doctrine so laid down by him, we shall inquire, after first investigating a little farther the true nature of what is called Conventional Law.

Conventional International Law, according to M. Ortolan, is composed of the laws, which nations have made for themselves. But this is not a correct view of the true nature of Conventional International Law. No Majority of independent nations have a right, by their own acts, separate or joint, to bind, or, in other words, to legislate for, the Minority; precisely because they are Independent, and have no Superior on earth, except the omnipotent and all-wise Creator and Preserver of the universe. What is called the Conventional Law of Nations, is just the aggregate or accumulation of the treaties or conventions, among nations, which are still in existence and obligatory, and which have not ceased to endure, and become merely matter of history. When, in civil society, individuals enter into bargains or contracts, for the sale or transference, for a valuable consideration, of immoveable estates, or moveable goods, or for the lease or temporary possession of the former, or loan of the latter, we cannot say with propriety of language, they have made so many laws; we can merely say with propriety, they have, by contract, acquired so many rights, and undertaken so many obligations, which the law, the legislative, and judicial powers, cause to be observed and performed. In the same way by treaties, nations merely confirm, or surrender, or transfer pre-existing rights or obligations, or convert what was formerly indifferent, optional, or discretionary, a matter of choice, into what is legally necessary and susceptible of enforcement; thereby creating a legal right in the one, and a legal obligation on the other. When there is a pre-existing legal right or obligation, in the nature of things, arising from a pre-existing juridical relation, or which has been induced and brought about by the unilateral acts of nations, without any joint agreement of two or more of them, the treaty merely confirms the right or obligation, which, as it did before, continues to exist in perpetuity, independently of the treaty. But such treaties, merely confirmatory of the pre-existing right or obligation, without any ulterior

object of specification, limitation, or modification, are rare; and when the subject of the treaty is previously indifferent, or matter of choice, optional or discretionary, the right created, or obligation undertaken, by the treaty or contract, cannot go beyond or exceed the terms and limits of the contract, or the parties who originally entered into it or acceded to it.

Greater Difficulties and Uncertainties in Public Treaties, or National Conventions, than in Private Contracts in the Internal Jurisprudence of States.

But besides Conventional International Law, not being composed of legislative acts, which nations have made for themselves, and besides their being subject to the same rules of law as Private contracts among individuals living in the social state, as recognised in the internal civil and criminal jurisprudence of each people, Public treaties among nations are liable to various other difficulties and uncertainties, from the want of the legislative and judicial coercive power exercised by the community; and from various points in their construction or interpretation not being fixed and settled in the same definite manner, as in the internal private law of states. And with regard to these points of difficulty and uncertainty, it may be proper, first, to notice shortly the views given by the latest, and generally considered, most eminent international jurists, as, if not solving the difficulties, at least exhibiting the most improved state of the established Conventional law of nations as existing at present.

Martens and Klüber.—Of these recent international jurists, Professor Heffter of Berlin is one of the latest, and certainly one of the ablest. But as Martens and Klüber both preceded him, by sixty, and thirty years, we shall begin with making a few extracts from their works. And their admissions show how little conventions and treaties are to be considered as forming a stable or permanent part of international law. Thus in his "*Précis du Droit des Gens Moderne de l'Europe*," 1820, liv. ii. chap. 2., Martens lays down the following doctrines:—§ 52. "That the right of self-preservation

authorizes a nation to depart from a treaty, which it can no longer execute without causing its own ruin or material loss, (*sa propre perte*).”—§ 53. “That treaties are not obligatory which are morally impracticable, or of which the execution would injure the rights of a third party; that of two treaties concluded with different nations, if incompatible with each other, the most ancient must be preferred, reserving any indemnification which may be due to the other nation.”—§ 63. “That the experience of all ages proves, nations are usually more disposed to conclude treaties than to fulfil them; and that accessory or auxiliary means were early resorted to for securing their observance, such as the sanction of an oath, pledges, hostages,” &c.

Again, in liv. ix., Martens lays down the following doctrines:—§. 342. “That a treaty expires when the resolute condition exists, or when the time for which it is concluded has elapsed, unless it has been renewed or prolonged, expressly or tacitly; and that there exists in Europe a much greater number of treaties only tacitly prolonged, than could reasonably have been expected or believed, considering the importance of the object; that the total change of the circumstances, which have been the cause of the convention, renders it invalid; “that the same rule holds, if the object of the convention perishes or changes; “that in simple, imperfect, or not legally exigible customary rights, each power reserves the right to abolish them, or to depart from them, provided it gives previous notice in due time; and, *à fortiori*, the mutual consent of nations may abolish or change points of simple or mere practice. In liv. ii. chap. 2., Martens farther states, § 65., “that in tacit conventions, the consent of the two parties, or of one of them, is inferred from acts which afford the proof of it; that a variety of acts may serve as proof of consent for a present case; that it is much more difficult to find acts sufficient to prove an engagement for future and successive prestations or acts to be performed; that to attribute this force, it is necessary, at least, that they have been undertaken not only freely and in the knowledge of the cause, but likewise in the well founded conviction of being obliged to undertake them; or that they be of such a nature, that the

uniformity of conduct for the future may be a necessary consequence of that which has been once observed; "that under such conditions, a single act may prove the tacit consent; but the proof is strengthened by the frequent repetition of these acts; "that the smallest part of the law of nations rests upon tacit conventions."

In the same way, in his "*Droit des Gens Moderne de l'Europe*," part ii. tit. 2., Klüber states, §. 154., that the renewal of treaties, or a prorogation of their validity beyond the stipulated term, is subject to the same conditions essentially requisite for the original conclusion, and is not of itself to be presumed, but may take place tacitly, if, after the term has elapsed, the parties continue knowingly and with deliberate purpose, to fulfil the conventional obligations and to accept the performance of them. And, in part ii. tit. 2., §§. 164, 165., Klüber states, that public treaties cease to be obligatory: 1. By the mutual consent of the parties interested; 2. When one of the parties, in virtue of a reserved faculty, departs from the convention; 3. By the lapse of the stipulated period; 4. By the attainment of the end, the sole object of the treaty; 5. When the execution of the treaty becomes physically or morally impossible; 6. When there is an essential change in a circumstance of which the existence was supposed to be necessary by both parties, whether expressly or according to the nature of the treaty; 7. By the (defection) default of one of the parties who refuses the execution of the treaty in question, or even of another quite different; 8. By the complete and entire accomplishment or fulfilment of the obligations, which are the subject of the treaty; the consequences remaining established between the contracting parties, notwithstanding supervening changes in the situation of affairs."

In short, it may perhaps be considered as definitively settled, that treaties bind all the parties who originally contracted, or subsequently acceded to them; that treaties last for the period specified in them, unless otherwise legally terminated, but cease upon the expiration of that period, unless expressly renewed, so far as regards obligations still to be performed in future; that conditional treaties are dependent

upon the existence or fulfilment of that condition; that stipulations or provisions applicable to a state of war must be held valid and binding, notwithstanding a rupture, at least during the first ensuing war, though not afterwards, when extinguished by hostilities, unless expressly renewed. But beside these, and a few other universally recognised rules, there is great vagueness, uncertainty, and doubt in the construction of treaties. For the validity of treaties, the interposition of free and voluntary consent is on all hands deemed essential. And, in treaties of commerce and other treaties, made during peace, free consent, of course influenced by interested national views, usually called patriotic, actually takes place. But in treaties of peace, the consent given has been sometimes alleged and contended to have been compulsory and not free, in consequence of the comparative state of weakness, want, and depression, to which the one belligerent may have been reduced by the events of the war just terminated.

Heffter. — We proceed to Professor Heffter of Berlin, who appears to us to be a more acute and profound jurist than either Martens or Klüber, and who, although deprived, by his death, of the assistance of his intended collaborateur, the (in Germany) celebrated M. Gans, himself completed, and in 1844 published, the contemplated joint work, entitled "*Das Europäische Völkerrecht der Gegenwart*," the present International Law of Europe. In §. 81. of this work, Heffter thus treats concisely of the obligations of treaties in the Law of Nations: "At all times, and among rude as well as civilised nations, treaties without any common statutory rule have been used or employed, as the lawful means of binding or imposing obligations; yet, nevertheless, they have never been solely relied on. In ancient times mankind took to their aid religion and the dread of supernatural power, in order to give them greater strength. But since even these means were often found insufficient, the naked belief in the self validity of treaties still fortunately remained, and was confirmed through Christianity, as through the positive law, finally, too, through philosophy. But although practice has not seldom raised the question, it has never been made clearly

intelligible whether, wherefore, and how far, a treaty bound; or was clearly obligatory through itself. — Another view which has been taken of this matter it is difficult to defend; namely, that a treaty, *duorum vel plurium in idem consensus*, in itself, only establishes the law or right through the unity of the wills; consequently also, only so long as this unity lasts or endures; and that in the case of a change of will in one of the parties, the other is only entitled to demand the restoration of the previous condition or state, including reparation for the loss or damage, which he has sustained in the rights hitherto belonging to him, from his having honestly subjected himself to the will of the other contracting party."

"It is only the general will, supported upon equal general interests, and equal moral sentiments, which can establish, according to the contract of individuals, a legally or juridically binding obligation, for the direct and lasting fulfilment of that which has been promised or undertaken. For that purpose, however, the state alone possesses in itself the means of enforcement; for individuals, in International Law, such compulsory or coercive power is wanting. The treaty has here, therefore, only the declared natural force, and signification. It finds a particular support only in the reciprocal interests of states, through its constant mediation, to remain in traffic or commerce with other states, and to acquire new rights. It receives a still greater guarantee in a system of states, such as the European is, which, in itself, rests upon reciprocity and an agreement of wills; to which consequently a state can only belong, if it recognises those fundamental principles of the binding power of treaties, which are consistent with the interests of all, and without which generally, no confidence or credit, no commerce is conceivable. Certainly, therefore, the treaties of nations amount to something, even although they may want the sanction of private law. *Pacta sunt servanda*, nevertheless still remains a chief fundamental rule of the law of nations. Only circumstances give to Conventional International Law a certain singularity or peculiarity; there is in it, too, a great looseness or laxity of fulfilment."

— Again, while he remarks that states, like individual men,

spring up, grow to manhood, become aged, decay, and disappear, Professor Heffter very properly qualifies the doctrine of the earlier international jurists, Grotius and Pufendorff, that "*res publica est æterna, universitas non moritur*," by observing "that the state is immortal only in its conception, (*und als motif*), and at the most in the sense that it is not dependent upon the physical existence of certain determinate individuals, as members, but exists, as long as members are reproduced in it."¹ Indeed, we do not think that, according to experience and in correct language, the quality of immortality can be predicated of a state; admitting, however, the universally recognised maxim, that a nation has a permanent or indefinitely perpetual existence, and continues, in the eye of law, to be the same identical nation, to have the same capacity and enjoyment of rights, and the same liability and subjection to obligations, notwithstanding the complete change in the individual members composing it, which it may have undergone in the course of successive generations; and notwithstanding even extreme changes in the form of its internal government.

But does it follow from this, that rights acquired, or obligations undertaken by treaties in general, if the term of their duration be not specially limited, or if they do not contain conditions or stipulations fixing that point, last in perpetuity for centuries to come, notwithstanding the lapse of time and non-exercise, and notwithstanding supervening events changing the circumstances and relative position of the contracting parties? Is the convention, that the stipulations and engagements contained in the treaty shall be binding in perpetuity, unless the parties mutually agree to retract or modify them, valid and effectual in law? Are the stipulations of "peace and amity *for ever*," frequently inserted by diplomatists in treaties of peace of any avail in law, or mere matter of form and surplusage? Are they not rather insignificant, if not absurd? Is the following doctrine of the recent international jurist, the Portuguese Ex-minister for

¹ Das Europäische Völkerrecht der Gegenwart, § 24. Berlin, 1844.

Foreign Affairs¹, well founded:—“Treaties bind nations only so long as the principle, upon which their validity rests, continues to exist; that is to say, so long as, from the conscientious and exact fulfilment of the obligations which it imposes on each of the two parties, there does not result to either lesion, or damage, or loss, which the one cannot avoid, and for which the other cannot indemnify it. According to the Internal Civil Law of States, this is the case of rescinding, *bonâ fide*, every contract between individuals; and when they cannot agree between or among themselves, the intervention of the law of the state is not called upon by them to annul the contract, which no authority could annihilate, but to declare whether, in fact, the lesion or damage, alleged by the one of the two parties, which asks or requires to be allowed to resile, has actually taken place.”

In his exposition of the duration and termination of public treaties, Professor Heffter, in § 99. p. 174-6., gives the following enumeration of the modes in which the obligations of treaties legally expire or become extinct:—“First, through actual fulfilment, when they proceed upon certain acts of performance, to be at once completely executed, not continuing or enduring. Secondly, through the insertion of a resolutive condition; and through the lapse of the previously arranged period. Thirdly, through an unilateral warning or intimation, duly given and made known, when there was a provision to that effect. Fourthly, through a renunciation or abandonment, duly declared by the party who alone is entitled to insist for performance. Fifthly, through the reciprocal revocation or abrogation of a bilateral treaty, which itself no third party can prevent. Sixthly, through the total destruction of the object, upon which the contract proceeds, so far as therein no fault or blame is imputable or attaches to any party. Seventhly, through the extinction or annihilation of the subject or party entitled or bound by the contract, without another legally, or according to the analogy of the treaty, coming in his place. Finally, there arises or takes place, if

¹ M. Pinheiro Ferreira, Notes sur Droit des Gens Moderne de l'Europe par Martens, vol. i. p. 390.

not always a complete extinction or annihilation, yet a suspension of the obligations of treaties, through the occurrence or intervention between the contracting parties, of a general or complete, not merely a partial state of war; unless the treaty be expressly concluded with a view to the duration or period of war, — a consequence which will be justified in the sequel, by a nearer examination of the right import or meaning of war. At the same time every treaty, in itself extinguished, may be again revived by an express or tacit renewal, only the renewal is here itself the rule for the future, and is, therefore, in all respects a valid treaty, binding in its provisions and stipulations. A tacit renewal must accordingly also have for itself a completely discernible and unequivocal mark or criterion, by which to judge and ascertain, that it is the view of the parties to allow the earlier treaty to continue in force generally, and in all its arrangements. Otherwise a continued performance and acceptance of what might have been demanded or required from the earlier treaty, is only to be considered as a single factum existing for itself."

In illustration of the last-mentioned mode in which treaties are terminated, viz. by general and complete hostilities, Professor Heffter proceeds as follows¹: —

"The next effect of the breaking out of a war is the actual suspension of every juridical relation during peace; and of all intercourse and commerce between the belligerent powers; for the judicial administration and enforcement of justice is now no longer possible; the war claims for itself all the means, faculties, and energy of the nation.

"On the other hand, it cannot be maintained, at least not according to the principles of the more recent law of war, that the war juridically, or legally, dissolves or extinguishes every legal bond or tie between the contending parties, and leaves such legal bonds or ties, to arise of new, as if for the first time through the succeeding peace; for, although every war puts at stake or in hazard or danger the existence of a state, the mere possibility of ruin or destruction is still not equivalent to actual destruction itself. Farther, those

¹ Das Europäisch-Völkerrrecht, § 122. p. 206.

obligations from treaties too, which are expressly undertaken with a view, or extended, to the case of a war, have an enduring validity, so long as no party is guilty of any injurious act, and thereby entitles the other to abrogate absolutely the obligation, or at least to suspend the same by way of reprisal; for till this takes place, there exists presumptively an unity of wills, the foundation of the obligations of treaties."

Further, in § 181. p. 304. Professor Heffter thus lays down the law:—"All obligations from treaties, of which the fulfilment was at first only to take place in future, in which also a change of will was still possible, in reference to the obligation undertaken, become doubtful and insecure, through the breaking out of a war; so that they require for their farther validity a confirmation and ratification, by a new, plain, and clear declaration of will."

Pinheiro Ferreira.—Further, in his *Précis du Droit des Gens Moderne de l'Europe*, § 58., Martens had thus stated the law:—"In all cases of a war breaking out between the contracting parties, treaties, although made for ever, fall of themselves, with the exception of the articles contemplating the case of the rupture." And in his notes on the work of Martens, vol. i. p. 390., M. Pinheiro Ferreira, late Minister for Foreign Affairs in Portugal, agreeing with Professor Heffter, confirms this doctrine, limiting the necessity for a clear, express, and special renewal to the obligations of which the performance at the time of the rupture were only to take place in future; and referring for the reasons of this to his own *Cours de Droit Public*, § 45., which reasons, he observes, M. Martens has not given.

We have thus noticed a number of the difficulties and uncertainties to which the Conventional Law of Nations, as composed of public treaties, is liable, in addition to what are found to exist in private contracts between individuals, in the internal jurisprudence of states. We have also endeavoured to ascertain how these questions are to be decided according to the most recent authorities. But until most of these questions can be answered satisfactorily to the conviction of the educated or intelligent portion of mankind generally, and until it be ascertained, by rigid and impartial

investigation, which of the treaties concluded among the different European independent states, in the course of the present and two preceding centuries, are now in force and obligatory on independent states, not mere matters of history, the Conventional Law of Nations, although highly useful in various departments, as supplementary, will, if adopted as now proposed, be found but a lame substitute, as a whole, for the Common Consuetudinary Law of Nations.

Errors in over-estimating the legal Effects of public Treaties.

In the preceding observations we have seen that the particular Conventional Law of Nations, composed of treaties, is, as a whole, defective as a legislative code, and very insufficient and uncertain in extent and duration; and that, although useful as a supplement in various cases, it affords but an unstable foundation, if substituted as a basis, for General or Common Consuetudinary International Law, which rests on the juridical or legal relations established by the omnipotent and all-wise Creator in the physical, corporeal, and mental constitution of mankind, — in the physical material situation and circumstances in which He has placed the human race on the surface of this earth, in the course of the physical material and physical mental, — excluding moral events, to which he has subjected them in this world, — and in the consequences of the delegated powers of action, which he has bestowed upon societies of men, or communities, or states, as well as upon individuals. But farther, the operation and effects of the Conventional Law of Nations have been greatly over-estimated and exaggerated by various jurists, and many very learned and able writers have fallen into what appear, upon more thorough investigation, to be errors in the effects they ascribe to public treaties. One description of errors consists in holding particular conventions or treaties to be almost the sole evidence of, and to form almost exclusively, the whole of International Law; and if not to constitute it originally, at least to alter and modify and recast it from time to time. Another description of error consists in holding a series or succession of treaties among two or more nations,

containing certain stipulations, as recognising certain principles or rules, and establishing them in future, to the effect of being legally obligatory on nations, who have never made or agreed to such stipulations, or who have done so only for a time, or with regard to particular nations, from particular considerations.

The first of these errors consists not merely in holding treaties to afford evidence of the actual performance of obligations, whereas they merely afford evidence of engagements to perform obligations, which occasionally have not been fulfilled, but also and chiefly in holding treaties to afford almost the only and sole evidence of International Law, to the exclusion and neglect of almost all other historical records; whereas the true and real evidence of General International Law, usage, and practice is to be found in the records of the national institutions, government, administration, and practice of each independent state; while treaties, though sometimes confirmatory of pre-existing rules of the common law, are usually merely exceptions from the previous general rule. We formerly pointed out in detail the Records and evidence of the General and Common Consuetudinary Law of Nations; on the other hand, the Records and evidence of Particular Conventional International Law, of course, exist in the various collections of treaties among modern civilised nations; and to the Germans, chiefly, we are indebted for the construction, or creation in a manner, of the diplomatic code. The idea appears to have originated with Leibnitz, in his "*Codex Diplomaticus*." Various large similar collections were made in Holland by Dumont, Rousset, and others, and in England by Rymer, Jenkinson, Chalmers, and others. But the collection of treaties and other state papers connected with International Law, and the arrangement of the contents of those documents into a system, continued to be prosecuted with the greatest zeal and success in Germany. This appears from the "*Vernunft und Völkerrecht*" of Glafey, the "*Beytrage zu dem neueste Europäischen Völkerrecht*" of Moser, the "*Codex Juris Gentium*" of Schmauss, and the "*Codex Juris Gentium*" of Wenck, the "*Literatur des Völkerrecht*" of Von Ompteda and Kamptz, and the "*Recueil des Traités*" of

Von Martens, of which last the Supplement far exceeds the original in number of volumes, and has been brought down to the present times. And with regard to the systematic works, or what the later German jurists have called the "*Droit des Gens moderne de l'Europe*," we may mention the Treatises of Günther, Martens, Schmalz, Klüber, Schmelzing, and Heffter.

But, however much we may be indebted to the recent German and also Italian jurists, such as Professor Lampredi, of Pisa, for their systematic treatises on International Law, we cannot admit the soundness and accuracy of the views entertained by some of them, with regard to the limits and extent of the legal operation and effect of the Conventional Treaties of Nations. In the few preceding observations, we have stated what appears to be the true extent of the legal operation of such treaties; and it is both extensive and great. But we cannot admit that such treaties between two or among several nations, constitute a general common positive or established International Law, or have legal validity, beyond the terms and duration of these treaties, or beyond the nations who are parties to them. The earlier international jurists, such as Grotius, Loccenius, and Bynkershoek, appear to have marked distinctly the difference in point of nature and effect, between what they called the Natural or Common Consuetudinary Law of Nations, and Conventional Law founded on treaties. But several of the later jurists appear to have mixed or confounded the two, so as not to form separate parts of a whole, which would have been quite correct, but so as to identify, or rather amalgamate, the two, and so as in a manner to substitute the latter for the former, or at least to recognise the latter very much to the exclusion of the former. The expressions of Voet are ambiguous, but rather imply that he understood the treaties between Holland and France, and some other states, to constitute the General and Common, as well as the Particular International Law of Europe. From the recent work of M. T. Ortolan, formerly alluded to, entitled "*Règles Internationales*," this is obviously the aim and object of the eminent French lawyers whom he says he consulted. Nay, perhaps, even our English great

jurists are not altogether exempt from this animadversion. Sir Dudley Ryder, and Mr. Murray, afterwards Lord Mansfield, in their answer to the celebrated memorial of King Frederick II. of Prussia, about the middle of last century, appear to found too much upon treaties, as constituting or proving, not merely the Particular Conventional, but also the General and Common Consuetudinary Law of the European Nations. Azuni, in his "*Droit Maritime de l'Europe*," published in 1805, tom. ii., pp. 40, 41., seems to consider the work of Professor Lampredi, of the University of Pisa, entitled "*Del Commercio dei Popoli Neutrali in Tempo di Guerra*," published at Florence in 1788, as left unfinished and incomplete, because he does not propound a system composed both of the General and Common Consuetudinary Law, and of the Particular and Conventional Law of Nations, mixed up together. But to us it rather appears Lampredi acted wisely, in not mixing up together these frequently heterogeneous and discordant elements, and in dividing his treatise into two distinct parts, the first embracing the General or Common Consuetudinary Law of Nations, and the second the Conventional Law of Nations, as sometimes confirming, but usually departing from, or modifying the former.

From what cause, or how, the error of more modern jurists arose, in confining their attention almost entirely to treaties between or among nations, and omitting the equally authentic and authoritative records of the internal legislation and administration of states towards foreign nations, in their historical narratives of International Law, it is not easy to explain; except, perhaps, that it arose from the ponderous Collections of Treaties, and other such State Papers, made at first chiefly in Holland, and afterwards in Germany, after the example set by, and the recommendation of Leibnitz, affording a more easy and simple task for methodical arrangement of their contents, than the comparatively difficult task, requiring more acute discernment, of tracing the practice of the Common Law of Nations from their own internal establishments and usages in their actual intercourse with foreign states; or that it arose from unilateral views, and partial and overweening patriotic zeal, to represent, as actually existing, or to aid in

bringing about a state of International Law, favourable to the peculiar interests of their native country. But to show that our observation is founded in fact, we shall select, in an interesting branch of International Law, viz., the Maritime Law of Nations during War, the example of one of the latest and best historical jurists, whose general fairness and impartiality, and strict regard to truth, preclude the suspicion of his being influenced in his historical narrative by any narrow, contracted views of peculiar selfish national interest.

Thus even the able and learned M. Schoell, in his greatly enlarged and improved continuation and recast of the "*Histoire des Traités de Paix*," commenced by M. Koch, has so far fallen into the error here alluded to, in making a division of the progress of Maritime International Law into a variety of different periods or epochs, founded solely on alleged changes of what appears to have been the original or earliest practice among the European nations, in consequence of several particular treaties having, in the course of the two last centuries, been entered into by certain individual nations, without taking into view or account, the general practice of these very nations towards other states, during the subsistence of these very treaties, and contrary to, or different from, the stipulations contained in them, as the said practice is evinced by the internal legislative or administrative regulations of the states or governments, who had entered into these treaties, the judgments of their tribunals, and the writings of their jurists; and also in consequence of several particular internal ordinances, established by one or two great nations, who, however powerful, could not justly or legally affect the rights of other separate and independent states. But such partial and scanty evidence, collected, or rather selected, from a few scattered treaties, without ascertaining the progressive conduct generally of each nation from its own records, or from the arbitrary ordinances of a powerful nation, is quite defective and insufficient for the establishment and composition of a correct and true narrative of the progressive advancement of International Law.

Thus in his theory, the earliest practical rule in maritime

war, as proved by the *Consolato del Mare*, and other authorities cited by M. Pardessus in his "*Collection des Loix Maritimes*," tom. ii. p. cxxii. and cxxv. and p. 303. by which an injured belligerent was entitled to seize at sea the vessels and cargoes of his enemy, and also the goods belonging to the enemy, although carried in neutral vessels, upon reimbursement to the neutral shipowner of the freight due to him, but not neutral goods although on board hostile vessels, is held by M. Schoell to have been changed by a treaty in 1417 between Henry V., King of England, and John the Fearless, Duke of Burgundy, by which it was agreed, that neutral goods on board a hostile vessel should be good prize; and by an ordonnance of Francis I., King of France in 1543, by which hostile goods on board neutral vessels were held to render, not only the remainder of the cargo, though neutral, but also the neutral vessel itself, liable to confiscation. Yet it is abundantly obvious, that this treaty merely altered, and could only alter, the previous state of the law and practice between England and Burgundy, so long as it lasted, while the practice of other nations, such as Denmark, Sweden, the Hanse Towns, Scotland, Spain, Venice, Genoa, &c. remained the same as formerly; and the practice even of England and Burgundy towards these other nations, also remained the same. And it is equally manifest an ordonnance of the King of France could merely affect the French practice, while it proved against that government an aggravated deviation from the previous usage.

Again, M. Schoell distinguishes a third epoch of Maritime International Law, upon the following very defective evidence afforded by detached national conventions: a public document by which the Turkish government agreed in 1604 that hostile goods on board French vessels should not be confiscated; a treaty in 1646, by which France granted a similar favour to Holland for four years, and afterwards granted, or refused, that indulgence at pleasure; a public document by which Holland obtained from the Ottoman Porte the recognition of the old rule of the *Consolato del Mare*, by which neutral property was respected though on board hostile vessels; a treaty in 1630 obtained from Spain by Holland, by which all Dutch

goods in hostile vessels were to be confiscated, but all goods on board Dutch vessels, though belonging to the enemies of Spain, were to be free; treaties between England and Portugal in 1642 and 1654, between England and France in 1655 and 1677, between England and Spain in 1667 and 1670, and between England and Holland in 1667 and 1674, by which it was agreed, very much in consequence of the interested urgency of Holland, that the neutral flag should protect hostile goods. But these temporary arrangements, on particular occasions, between individual nations, did not alter the general rule recognised in previous practice, and founded on the obvious and almost intuitively apprehended maxim of right, that a belligerent who has been provoked by injury, is entitled to enforce his rights against his enemy by seizing his goods, whether in his own country or on the high seas. And, accordingly, in point of fact, the practice of the different nations just mentioned, towards others, than the opposite contracting parties, continued, notwithstanding these treaties, to be the same as formerly; as appears from their own internal regulations, records, and works of their writers, such as Loccenius, Bynkershoek, D'Abreu, Valin; and no such treaties were entered into by England, with the northern kingdoms of Denmark and Sweden.

Proceeding in the same course of inconsequential deductions from premises inadequate in point of fact, M. Schoell represents the celebrated *Ordonnance de la Marine* of Louis XIV. in 1681, as constituting a fourth epoch of Maritime International Law; as if the legislative enactment of any single nation could constitute a body of International Law, obligatory on all the other independent states of Europe. In the same vague and inaccurate mode of apparently holding treaties absolutely and conclusively to constitute International Law, and to set aside not only previous practice, but to annul legal principles, M. Schoell next distinguishes the treaty of Utrecht in 1713, as forming a fifth epoch in International Law, and establishing the rule, that the neutral flag protects the hostile cargo. But this is another deduction unwarranted by the premises. The treaty of Utrecht in 1713 between France on the one side, and Great Britain and Holland on

the other, no doubt in consequence of the influence possessed by Holland at that period, sanctioned the rule just mentioned; and so long as that treaty remained in force, the parties who so contracted, were of course bound to observe this rule towards each other. But that this treaty was *not* intended to establish, and did not establish, that rule, as General Common International Law, is manifest from the fact of the stipulation being inserted only in the treaties between Great Britain and Holland on the one side, and France on the other; and from its not being included in the other treaties, which are usually denominated the Treaty of Utrecht; such as the treaty of 1713, between Spain and Great Britain, and between Spain and France, or extended in any way to the northern kingdoms and states of the Baltic, or to the southern states of the Mediterranean and Adriatic. The eminent Spanish and French jurists of last century, also D'Abreu and Valin, clearly prove that such treaties merely constituted exceptions from, but did not permanently change, the general rule and practice observed by these nations.

Finally, upon the same erroneous theory of holding treaties or special contracts between particular nations to constitute, and from time to time to alter and form of new General or Common International Law, M. Schoell represents, as a sixth epoch in the progress of that law, the French *Réglement* of 1744, which so modified the practice of France, as to declare that hostile goods on board neutral vessels should, as formerly, be confiscated, but that the neutral vessels should be released. He notices also under this epoch, certain treaties between France and other states, in the earlier part of the eighteenth century, and inquires into the changes in French practice. But into this detail it is unnecessary to follow him, since these treaties could only bind the nations, who were parties to them, and could not, any more than French practice, of itself, constitute Common International Law.

So much for the evidence of the class of errors we have just been considering—those of exaggerating the extent and effects of the Conventional Law of Nations, by assuming treaties between or among nations, as chiefly or not wholly constituting and affording evidence of the existence, and of

the successive alterations of the General and Common Consuetudinary Law of Nations, as well as of the Particular Conventional Law of Nations, or *Jus Pactitium*, — of omitting all notice of the contemporary different practice of the contracting parties themselves towards the other nations, with whom no such treaties have been entered into; and of passing over in silence the temporary nature of treaties, and the various events and accidents, by which they may be legally extinguished and terminated.

In our next article we proceed to the other class or description of errors before alluded to, and conclude our cursory observations on this subject.

ART. IV.—THE SEPARATE JURISDICTIONS OF LAW AND EQUITY.

Report upon Judicature in the Presidency Towns. From the Indian Law Commissioners to the Honourable the President of the Council of India in Council. Dated 15th of February, 1844.

As in the physical, so in the moral world of discovery, it almost invariably happens that various men at different parts of the earth will be found directing their attention at the same time to the same point, and often coming to the same conclusions. Those who have been, from position, or circumstances, or genius, in advance of their fellow men, have been found, watching the dawn of the coming truth, from their various positions throughout the world, with nearly equal information, although frequently using different methods of arriving at the same results. We can all well remember how about the same time the inquiries of Tycho Brahe and Kepler were sweeping the sky from their separate observatories¹; and many recent illustrations of the same mode of arriving at discoveries in various departments of science will readily occur. The time arrives when the truth is to appear; and in passing from obscurity into light, it is usually communicated to more than one. This reflection has been

¹ "The achievements of intellectual power, though often begun by one mind and completed by another, have ever been the results of combined exertions."—*Brewster's Life of Newton*, 113., in allusion to these discoveries.

suggested by the paper at the head of the article. It is at least curious that about the same time in British India, in the United States of America, and in this country — in all of which the same general law prevails — that the propriety of the present separation of the jurisdictions of Law and Equity has come under consideration, and that the legislature of one of these countries has, with some degree of violence, declared that such separation shall no longer exist. With us, and with all our vast dependencies, this change, if it ever takes place, must proceed more slowly. It must be approached by degrees: but however willing we may be not to attempt any sudden or violent alteration of a point on which turns so much of our present juridical constitution, yet no one will deny that under the circumstances, the subject demands the fullest consideration. We have already¹ repeatedly called attention to the change which has taken place in the Courts of New York; and we now propose making some very full extracts from the report of the Indian Law Commissioners² on the same subject. It is to be observed that here the Commissioners have the full advantage of free communication with the learned Judges of the Supreme Courts in the three presidencies, — a practice for which it could be wished that more precedents could be found in this country among the Judges of our Superior Courts, who are not always inclined to answer a set of printed questions sent them by a Committee of the House of Lords, on subjects intimately connected with the administration of justice. There is no such reluctance, we are happy to see, shown in India; and we are satisfied that the greatest advantage to the community will result from the experience thus communicated by the legitimate heads of the profession.

Without further preface, let us see in what way the subject is here dealt with. "In the result," the Commissioners say (p. 2.), "we contemplate the administration of all the substantive law of the country put into the form of codes by one system of Courts."

They thus state the present difficulty: —

¹ 8 L. R. 387. See also "Jurist," Nos. for May and June 1849, *passim*.

² The gentlemen who sign this report are C. H. Cameron (who has now retired from the Commission), F. Millett, D. Elliott, and H. Borradaile.

"At present there is no way in which a suitor in the Presidency Towns (Bombay is a partial exception) can have the benefit of cheap and rational procedure (particularly in the *vivâ voce* examination of his adversary), without foregoing the benefit of that legal learning which secures the correct application of the substantive rules of Law and Equity. Nor is there any way in which a suitor can get the benefit of that legal learning, except by sacrificing the advantages of cheap and rational procedure." (P.2.)

And then they thus enter upon the main question of establishing a new Court:—

"The second respect in which the Courts existing in the Presidencies are very unfit models, is, that the Rules of Law which are called Law, and the Rules of Law which are called Equity, are administered by two different jurisdictions. In the result, we contemplate the administration of all the Substantive Law of the country, put into the form of Codes, by one system of Courts. But it seems clear to us that the Rules of Law which are called Law, and the Rules of Law which are called Equity, should, in their present condition, be administered by one system of Courts in the Presidencies as they already are in the Mofussil. On account, however, of the magnitude of this experiment, and on account of the high authorities which may be vouched against it, we propose to proceed by steps.

"We propose only to give to our new Court power to administer complete justice—that is, to administer Equity as well as Law—in all suits within its jurisdiction; and we propose that its jurisdiction shall be concurrent with, not exclusive of, *the jurisdiction of the Supreme Court in actions at Law*, leaving to the Supreme Court alone, for the present, all the rest of its Equitable jurisdiction. We ourselves feel perfectly confident of the success of our experiment; but confidence of the success of such an experiment cannot be attained without long and careful reflection: the public, therefore, cannot be expected fully to share it. But proceeding, as we propose, by steps, all that can be imagined to be put to hazard by failure is of trifling value compared with the benefits to be attained by success. For suppose that, as we expect and intend, the suitors at law should be drawn away from the Supreme Court by the greater cheapness and simplicity of the new procedure, and the faculty of examining the adversary; and suppose further that, contrary to our expectations, the new judicature, original and appellate, should not appear to those who may watch its operation, with a view to the interests of justice, to be a

powerful instrument for the discovery of truth and for the correct application of the rules of Substantive Law, then the whole of that large portion of Equity which is not consequent upon a suit at Law would remain untouched, and, if ever reformed at all, would be reformed in some other way. The whole machinery would be left standing, and the portion of Equity and of Law drawn away by our new Court would revert to its original condition.

"On the other hand, if the experiment should, as we venture to foretell, be completely successful, the Government could then proceed, with the greatest confidence, to provide that the new Court should entertain all suits in Equity, whether based upon previous proceedings at Law or not.

"In like manner, and for the same reason, (*viz.*, the doubt which may be felt by the reflecting portion of the public as to the success of our experiment,) we do not recommend the abolition of the Common Law jurisdiction of the Supreme Court. We believe that such a measure might be unpopular; and we think that our object may be attained in a gentler way, and without shocking any prejudices, by allowing the two systems to subsist together. We do not even intend to protect the jurisdiction of the new Court by enacting that no one who sues at law in the Supreme Court shall recover costs.

"If this plan is adopted, there will be two roads open at once by which the suitors of the Presidencies may obtain the great benefit of having the profound learning of the Judges of the Supreme Court applied to their affairs.¹ To disentangle transactions which the ignorance, negligence, and fraud of mankind have complicated, and to refer each essential part of the transaction to the principles of Law or Jurisprudence which ought to govern it, must always be the subject-matter of a science and an art. It is vain to expect that this science and this art can be fully mastered without long and arduous discipline. That discipline the Judges of the Supreme Court have gone through; and it is because of the high value we set upon their science and art, that we are so anxious effectually to open the advantages of them to the public.

¹ The only qualification we have introduced into the Act for the professional Commissioners, is, that they shall be Barristers of five years' standing; under this provision the Judges of the Supreme Court might of course be employed in administering justice in the new Court. But if they should not be so employed, the suitors will have ready means of obtaining the benefit of their learning under the scheme which we are recommending, by appeal to the College of Justice. — *Note of Commissioners.*

"When these two roads are open at the same time, it will be very instructive to observe what sort of causes are carried by the new road and what sort by the old. Our own belief is, that in no long time it will become disreputable to sue at law in the Supreme Court. It will soon be understood that a plaintiff who prefers bringing his action there, is a man who is afraid of being personally examined as to the truth of his case; a man who shuns equity and good conscience; a man who wishes to entangle his adversary in the meshes of written special pleadings, and to have his cause decided upon some point foreign to the merits of it.

"In this state of things we of course expect that the Common Law jurisdiction of the Supreme Court will wither away in the presence of its rival, and that the Legislature will shortly be able to abolish it without exciting alarm or regret.

"There are two other respects in which the tribunals of the presidencies are, in our opinion, unfit models.

"First, in respect to their method of pleading.

"Secondly, in respect that the public is not associated with them in the business of judicature.

"In the Supreme Court there are the elaborate rules of English pleading calculated for the most part, as we believe, to produce the best results when they are observed; but as the pleading is not oral, the mode in which the neglect of them is visited upon the suitors produces great mischief, and the consequence of this mischief has been a very strong prejudice against special pleading. To such an extent has this prejudice run that every unfair attempt to put aside in an argument the real merits of the case, is in popular language called special pleading. It must be confessed, however, that the confusion of thought which is implied in such an application of the term 'special pleading' is owing quite as much (if not more) to the indiscriminate defence of the English system, as to the indiscriminate attack upon it. The truth is that special pleading, that is to say the logical rules which constitute the essence of it, and which are of universal application, is not only, what Mr. Serjeant Stephen calls it in his admirable treatise on the subject, 'a fine juridical invention,' but is the method which ought to be followed in all disputes, whether forensic or not, by parties desirous in good faith of terminating their disputes.

"In the Court of Requests the pleading is oral, but is subjected to no rules.

"In neither tribunal is there any jury, or any portion of the public appointed to perform such functions of a jury as are really useful.

"The draft act for establishing our new Court embodies our project for reform in both these particulars ; but we beg to reserve the full discussion of them for a future report. We are aware that with respect to them differences of opinion exist, while with respect to the subjects of our present report we have sanguine hopes of unanimity." (P. 5.)

The argument is afterwards fully and fairly entered upon : —

"The subject is very intricate, and much adventitious obscurity has gathered about it from the want of accurate distinction between schemes for investing Courts of Law with equitable powers, by means of legislative interposition, and schemes for doing the same thing by mere judicial authority. All schemes of the latter kind must be defective, must be productive of consequences not desired by the framers of them ; because no judge, however much disposed *ampliare jurisdictionem* for the benefit of the suitors in his court, can venture by mere judicial authority to assume all the powers and to create all the machinery which are necessary for the effectual exercise of equitable jurisdiction. The Legislature alone can give these powers and this machinery.

"The opponents of this branch of law reform can say with truth that Lord Mansfield failed in his attempt to accomplish it ; that Lord Kenyon, Lord Eldon, and Lord Redesdale have pronounced his attempts to be extremely mischievous ; and that Mr. Justice Buller, who was his favourite disciple, is believed, upon the high authority of Lord Eldon, to have recanted in his latter days when mature experience had shown him the fallacy of his early opinions.

"If these statements could neither be answered nor explained away, it would be impossible to deny that they form a very strong presumption against the success and the prudence of any such enterprise as that in which we are now endeavouring to engage the Government of India. But a careful examination of the leading cases at Law and Equity upon which these statements are founded, will show that they may be completely explained away, so far as regards our purpose, by the distinction above brought to view. Perhaps, also, it will appear from this examination that even the inherent deficiency of the instrument with which Lord Mansfield worked, would not have rendered the attempt so unavailing, if the zeal and industry of later judges and chancellors had not been so steadily exerted to counteract it. If, instead of

this, Lord Mansfield's doctrines had been followed, it is probable that the public opinion on the subject would have been changed, and that the Legislature would in time have conferred the necessary powers upon the Common Law Courts. It is possible also that Lord Mansfield thought the process of attachment might be employed for enforcing any equitable jurisdiction which the Courts of Law might succeed in acquiring.

"Sir James Scarlett (now Lord Abinger), in a communication to the Commissioners on Courts of Common Law (from which we have borrowed some of the provisions of our scheme), published in the appendix to their first report, expresses himself as follows:—

" 'The Courts of Common Law should be possessed of sufficient power in all cases of actions properly brought before them to oblige the parties to do justice to each other, without having recourse to a bill in Equity. Those who look to the history of the Common Law from the accession of Lord Mansfield to his high station in the Court of King's Bench will perceive, that if the same liberal and enlightened spirit had always prevailed in the Courts of Common Law, many of the difficulties in the way of suitors would long since have vanished; he first allowed a defendant to have a commission from the Court for examining witnesses abroad. The Legislature has slowly and at length allowed the same privilege to a plaintiff.' (P. 655.)

"We proceed to the examination of the cases. Lord Mansfield finding himself frequently obliged in the Court of King's Bench to do what he felt to be unjust, and what he knew that the Courts of Equity would on that account render of no effect, looked anxiously for every occasion on which by the exercise of judicial discretion, he might assimilate the doctrines of his Court to those of the Equity Courts, and thus do justice at once to his suitors instead of driving them to seek it elsewhere at the cost of much money and much time. For this he was stigmatised by Junius as an 'admirable Prætor,' and by Lord Redesdale from the Bench as having 'on his mind prejudices derived from his familiarity with Scotch law.' The desire of a judge to be saved from the necessity of doing manifest injustice might, one should think, be accounted for without having recourse to prejudices in favour of the Scotch or Roman systems. Lord Mansfield, no doubt, admired this part of those systems because he desired to decide justly, he did not desire to decide justly because he saw in those systems the means of doing so.

"One occasion which presented itself to him of assimilating the

decisions of his court to the decisions in Equity, was the execution of powers of appointment.

"In the case of *Rattle v. Popham*, it appeared that upon a marriage settlement a power was given to every tenant for life, when in possession, to limit the premises to any woman he should marry, for her life, by way of jointure and in lieu of dower. The tenant for life made a lease for ninety-nine years determinable on the death of his wife. Lord Hardwicke in a Court of Law held the lease not to be warranted by the power. The widow brought her bill in the Court of Chancery, and Lord Talbot, arguing from the same premises, the power and the lease, without any other circumstance, held the lease to be warranted by the power, and decreed the defendant to pay all the costs both at Law and in Equity. See 2 Strange, 992.; 2 Burr. 1147.; 7 T. R. 480.; and Cunningham, 102.

"Lord Mansfield thought this a very inconvenient and absurd collision of Law and Equity, and he thought, moreover, that on this particular subject, viz. the execution of powers of appointment, the collision was not rendered necessary, nor even justified by technical principles. He thought that powers of appointment being originally in their nature equitable, and only falling under the cognizance of Courts of Law by virtue of the Statute of Uses, whatever is a good execution of a power in Equity ought to be a good execution at Law. He seems, however, to have been fully aware that both the legal and equitable decisions on the subject were inconsistent with this doctrine." (Pp. 21—24.)

We must now make a long extract in continuation, but we think it is well worthy of our readers' attention :—

"The short history of this matter is as follows :—

"In *Whitlock's case*, 8 Rep. 69 b., it was laid down and agreed by the whole Court that under a power to make an estate for three lives, the donee cannot make a lease for 99 years determinable upon three lives.

"This resolution of the Court of King's Bench, Lord Nottingham, when Lord Keeper, declared might be laughed at. This was in the case of *Smith v. Ashton*, Mich. 1675. In *Freeman's Cases* in Chancery, Appendix 309., he is thus reported : 'But when it doth appear that it was intended the person should have such a power, the Court of Chancery will not be strict in all the circumstances of executing it; and he said the resolution in *Whitlock's case*, 8 Co. (where an estate is made for ninety-nine years, if three

lives lived so long, in pursuance of a power to make leases for three lives), may be laughed at; and therefore although *æquitas sequitur legem*, generally, yet sometimes *lex sequitur æquitatem*, and the judges of late have made larger constructions of powers, as appears in Cumberford's case, 2 Roll. 262.'

"It does not here appear with perfect distinctness whether Lord Nottingham meant that the decision in Whitlock's Case might be laughed at because it was bad law, or only because it was such law as a Court of Equity would take care to render of no effect. But enough appears to warrant us in believing that this eminent chancellor did not (as some later Equity judges have done) hold it to be the duty of the Common Law judges to persist in making decisions at Law which were sure to be laughed at in Equity.

"It was, however, upon the authority of the resolution in Whitlock's Case that the above-mentioned case of Rattle v. Popham was decided at Law.

"Lord Mansfield's opinion upon that case and upon the subject in general is expressed in the case of Zouch v. Woolston, 2 Burr. 1146.

" 'There is good sense in what Mr. Dunning said (Mr. Dunning was counsel for the defendant), that executions of powers should have the same construction, force, and effect in Courts of Law which they have in Courts of Equity, because the Statute of Uses transferred that mode of real property from Equity to the Common Law. Whatever is a good power or execution in Equity, the statute makes good at Law.'

"This and other observations of Lord Mansfield in the case of Zouch v. Woolston, gave rise to the violent assault which Lord Redesdale made upon him in the case of Shannon v. Bradstreet. 1 Schol. & Lef. 52.

" 'Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch Law, where Law and Equity are administered in the same courts, and where the distinction between them which subsists with us, is not known, and there are many things in his decisions which show that his mind had received a tinge on that subject not quite consistent with the Constitution of England and Ireland in the administration of justice. It is a most important part of that constitution that the jurisdictions of the Courts of Law and Equity should be kept perfectly distinct; nothing contributes more to the due administration of justice. And although they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are dif-

ferent; and any body who sees what passes in the Courts of Justice in Scotland will not lament that this distinction prevails. But Lord Mansfield seems to have considered that it manifested liberality of sentiment to endeavour to give the Courts of Law the powers which are vested in Courts of Equity; that it was the duty of a good judge *ampliare jurisdictionem*. This, I think, is rather a narrow view of the subject — it is looking at particular cases rather than at the general principle of administering justice, observing small inconveniences, and overlooking great ones. On this argument of Mr. Dunning, Lord Mansfield said that “there was good sense in what he said,” and that “whatever is a good power or execution in Equity, the Statute of Uses makes good at Law” — very good — but the statute does not make good at Law what was not good in Equity, but which a Court of Equity, by its peculiar mode of acting, will make good. This distinction Lord Mansfield was much disposed to overlook; for example, he considered contracts for leases to be leases, and was followed by Mr. Justice Buller. Great inconveniences ensued, which are now happily got rid of. A Court of Equity makes good a contract by decreeing an actual lease; a Court of Law cannot do so. Lord Mansfield inclined to hold a party bound by a contract not to set up his legal title in ejectment, and so in many other instances; forgetting what he himself had been familiar with in his practice in Equity, and that he would endanger half the titles in the kingdom.

“Mr. Justice Buller held that when a mortgage term had been once assigned in trust to attend the inheritance, the owner of the term could not make it a mortgage term again, and in consequence he drove the mortgagee into a Court of Equity, and produced that very mischief which Mr. Justice Wilmot, in *Zouch v. Woolston*, considered to be a very grievous one; Lord Mansfield is represented by the reporter in the case of *Zouch v. Woolston* as having said that “after the Statute of Uses, Courts of Equity reasoned as they would have done if that statute had not been made. And yet whatever is an *equitable* ought to be deemed a *legal* execution of a power; for there can be no circumstance to affect a remainder-man personally in conscience when a power is not duly executed, any more than the issue in tail or the successor of an ecclesiastical person if a lease is not duly made.” If these words really dropped from Lord Mansfield, he must have totally forgotten all that passed while he was in practice in Courts of Equity. This would overturn the case of *Coventry v. Coventry*, and all the cases on jointuring powers. The cases of tenant in tail and of

ecclesiastical persons are totally different; there was no power to bind a remainder-man arising from the nature of an use previous to the Statute of Uses, and as to ecclesiastical persons, they are prevented by statute from making leases except pursuant to the statute; and all leases not made pursuant thereto are expressly made void against the successors to all intents and purposes. The same reporter makes Mr. Justice Wilmot say, "It is much to be lamented that after the Statute of Uses the Courts of Common Law had not adopted all the rules and maxims of Courts of Equity." It is scarcely to be believed that this could have fallen from Mr. Justice Wilmot; and if Lord Mansfield found fault with the decision in the case of *Rattle v. Popham*, as he is represented to have done, I think with deference that there was no ground for the remark. I must therefore consider what is thus attributed to Lord Mansfield and Mr. Justice Wilmot in the case of *Zouch v. Woolston*, as of no authority on this subject; and I think I am warranted by the decision in *Campbell v. Leach* (made with the concurrence of such high authorities as Lord Chief Justice De Grey, and Chief Baron Smyth) in saying that a contract of this description does bind a remainder-man.'

"Before we proceed to consider these objections of Lord Redesdale with reference to our own purpose, we must endeavour to clear up some of the difficulties which appear to us unnecessarily to perplex this controversy. When Lord Redesdale insinuates that the expressions attributed to Lord Mansfield and Mr. Justice Wilmot are so absurd that it is hardly to be believed that they really could have used them, he seems to us to be under a great misapprehension of their meaning, and also to suppose that the differences between them and his own opinions were more numerous than in truth they were.

"The only fundamental difference, from which all the rest are deducible, is as to what is a good execution of a power in Equity, putting Law out of the question.

"Lord Redesdale admits that whatever is a good power or execution in Equity, the Statute of Uses makes good at Law; but he implicitly denies that such an execution of a power as the lease in the case of *Rattle v. Popham* is good in Equity. According to him, it is only such an execution as a Court of Equity, by its peculiar mode of acting, will make good. Lord Mansfield and Mr. Justice Wilmot, on the other hand, would have said, and, as it appears to us, with rigorous accuracy, that the lease was a good execution in Equity; and that the only reason why a Court of

Equity acts in such cases in the peculiar mode alluded to, is for the purpose of making such an execution of a power good at Law. And consequently, if the Courts of Law had (as Lord Mansfield thought they ought) held such executions of powers to be good at Law by the statute, because they were always good in Equity; there would have been no necessity for Courts of Equity to interpose with their peculiar mode of acting so far as regards the execution of powers. When Lord Mansfield held an agreement for a lease to be a lease he was proceeding on different grounds. The Statute of Uses did not help him then. He was no longer availing himself of technical principles to get at Equity in a Court of Law, but encroaching upon equitable jurisdiction, with no other excuses than the desire of doing justice, the equitable origin of the purpose to which the action of ejectment has been applied, viz., that of recovering the land, and the doctrine that ejectment, being a fictitious action invented by the Courts, no party ought to be permitted to prevail in it against good conscience. But in his doctrine respecting the execution of powers, he was able to deduce the conclusions at which he desired to arrive, from the letter and spirit of the Statute of Uses, that statute having converted a large portion of Equity into Law. We do not think it necessary to quote any of the numerous Equity cases in which it is distinctly laid down that such an execution of a power as the one in question, is good in Equity. It would, indeed, be sophistical to quote them against Lord Redesdale; for he of course did not mean to dispute the proposition as it is used in those cases, but only to explain it. To show (that is) that when the authorities say a *good execution in Equity* they mean an execution which will be made good in Equity by the mode of acting peculiar to the courts administering that system. That is the real question on which Lord Mansfield's opinion and Mr. Justice Wilmot's are to be set against Lord Redesdale's, and it is not properly a question of English Equity, but a question of General Equity, and one of which none of the English Equity cases afford any solution. It could not, indeed, ever arise for practical solution in any English Court of Equity. It could only arise for practical solution in a country where there are no Courts but Courts of Equity.

"The question stated generally is this. When A. is bound in conscience (as for example by being contracted) to make a good title to B. why does a Court of Equity direct him to execute a conveyance? Is it for the purpose of conferring upon B. a good

title both at Law and in Equity, or merely a good title at Law? We conceive it is for the latter purpose only.

“ So little has this part of the theory of our legal constitution been considered, that as far as we know the only authorities on it are, first, that of Lord Mansfield and Mr. Justice Wilmot themselves in this case of *Zouch v. Woolston*, and some other cases (if we are not mistaken in supposing that this doctrine is involved in them) and secondly, that of Professor Austin, in his notes to the Table containing ‘ The arrangement, which was intended by the Roman institutional writers (according to the opinions current amongst civilians from the latter portion of the 16th to that of the 18th century.) ’

“ According to English *Equity*, says Mr. Austin, (*i. e.* according to the law which certain of our Courts administer) a sale and purchase though it is styled a *contract*, imparts to the buyer, without more, *dominion* or *jus in rem*. In the technical language of the system, what is agreed to be done is considered as done. The subject of the sale is his as against the seller especially; and the subject is also his as against the world at large. The only interest in the subject which remains to the seller, is a right in *re alienâ*: a mortgage or lien expressly or tacitly created, to the end of securing the equivalent for which he has aliened.

“ But according to the antagonist system which is styled pre-eminently *Law*, a sale and purchase, without more, merely imparts to the buyer *jus ad rem*. The seller is obliged by the sale to transfer the subject to the buyer, and, in case he break his obligation by refusing or neglecting to transfer, the buyer may sue him on the breach, and recover compensation in damages. But that is the extent of the right which the sale imparts. The property or dominion of the subject still resides in the seller, and, in case he convey the subject to a third person, the property or dominion passes to the alienee.

“ Now, if the antagonist *Law* were fairly out of the way, the right of the buyer according to *Equity* would stand thus. Unless the seller refused to deliver the subject, and the buyer, in that event, were satisfied with his right to compensation, the sale and purchase, though styled a contract, would give him completely and absolutely *dominion*, or *jus in rem*. He could vindicate or recover the subject as against the seller himself, and as against third persons who might happen to get the possession of it. The so-styled contract would amount to a perfect conveyance.

“ But, by reason of the dominion or property which remains to the seller at *Law*, the sale and purchase even in *Equity*, is still

imperfect as a conveyance. In order that the dominion of the buyer may be completed in every direction, something must be done on the part of the seller. He must pass his *legal* interest in *legal* form. He must convey the dominion or property which still resides in him *at Law*, according to the mode of conveyance which *Law* in its wisdom exacts.

“‘To this special intent or purpose, the buyer, even in Equity, has merely *jus in personam*, or (borrowing the language of the Roman Lawyers) the subject of the sale, even in Equity, continues *in obligatione*.

“‘Speaking generally, the buyer in contemplation of Equity has dominion or *jus in rem*, and speaking generally, the sale in Equity is therefore a conveyance.

“‘But, to the special intent or purpose which is mentioned above; the buyer has *jus in personam*, or (changing the shape of the expression) the seller remains obliged. This right *in personam certam* and this corresponding *obligation*, Equity will enforce in specie. And in respect of this right *in personam*, and of this corresponding *obligation* the sale, even in Equity, is properly a *contract*.’

“This is a very explicit statement of the general doctrine of English Equity, and, if it is also a correct one, it follows, with regard to the execution of powers for meritorious consideration, that, as soon as the Statute of Uses had put ‘the Antagonist *Law* fairly out of the way,’ every court in the country ought to have held that such an execution of a power as was, speaking generally, a conveyance in Equity before the statute, and only not a conveyance in Equity for the special purpose of enforcing the obligation to make such a conveyance as ‘*Law* in its wisdom exacts,’—every court in the country, we say, ought to have held such an execution to be a perfect conveyance to all intents and purposes.

“Now if this doctrine be kept in view in the examination of the dispute about the execution of powers, it will be seen that (be the doctrine correct or incorrect) Lord Mansfield knew perfectly well what he was about,—that there is no ground for accusing him of having forgotten all that passed while he was in practice in Courts of Equity, and of overturning all the cases on jointuring powers, nor for assuming that he held a contract of the sort in question not binding on a remainder-man.

“Sir E. Sugden in his work on Powers adopts Lord Redesdale’s view of the question of general Equity and also his two suppositions,—first, the supposition that Lord Mansfield was altogether forgetting that question, whereas we believe that it was distin-

present to his mind, and that all his conclusions are logically deduced from it; and secondly, the supposition, which we believe to be equally unfounded, that Lord Mansfield thought his doctrine, that the execution of powers should receive the same construction at Law as in Equity, was in accordance with the course which, under the existing circumstances, Courts of Equity had adopted.

“On the question of general Equity and on the supposition that Lord Mansfield had neglected it, Sir Edward Sugden merely adopts what Lord Redesdale had said. But with respect to the other supposition he observes, ‘Lord Mansfield adduced this decision of Lord Talbot’s (the decision in Equity in *Rattle v. Popham*) in support of his favourite doctrine, that whatever was an equitable, ought to be deemed a legal execution of a power. In a late case before Lord Redesdale, in which he combated this doctrine, he said that if Lord Mansfield found fault with the decision in the case of *Rattle v. Popham*, as he was represented to have done, he (Lord Redesdale) thought with deference that there was no ground for the remark, and indeed, notwithstanding Lord Mansfield’s assertion, it appears from a manuscript note of the case, which will be found in the appendix to this volume, that Lord Talbot admitted clearly that the power was *not* well executed at Law, but he relieved the wife against the defective execution on the general rule of Equity.’

“Now there is no assertion of Lord Mansfield inconsistent with this version of the case. He never meant to say that Lord Talbot found fault with the decision at law. He did *not* adduce the case in support of his own favourite doctrine, but for the purpose of showing what mischiefs had ensued because Courts of Law had omitted to adopt that doctrine, and had thus driven Courts of Equity to deal with these cases just as if the Statute of Uses had never been enacted.

“All this derives strong confirmation from what Lord Mansfield himself afterwards said in the case of the Earl of Darlington *v.* Pulteney.

“It is very difficult to maintain on any principle of law, reason or convenience, a distinction between *equitable* and *legal* executions of powers, which were originally in their nature equitable, but they are by the Statute of Uses transferred to Common Law. Mr. Kenyon has said very truly, that at Common Law powers were unknown. They were modifications of trusts, and directions to the trustees which bound his conscience, and which he was

compellable in a Court of Equity to execute. The Statutes of Uses transferred entirely all that was equitable into a legal modification; and the Courts of Law were then bound to ask what was the Equity. It has likewise been very truly said, that there were few cases upon the execution of powers before the Statute 27 H. 8. c. 10., and none have come down to our time by way of precedents. Powers, therefore, being a new thing, and the Courts of Law having no equitable precedents in point to guide them, compared them at first to conditions, which they are not at all like; and consequently held that they should be construed strictly. They looked upon them in the lights of powers vested in a third person over the estate of another man; whereas in fact they are only a different species of ownership, and enjoyment of property. But a long series of precedents has now settled in the Court of Chancery, that in the construction of powers, wherever the power is executed for a *meritorious* consideration, namely, as a provision for a wife or child, or for the benefit of creditors or purchasers, there the precise form prescribed for its execution need not be strictly pursued, and if it is now settled, it is settled on principles that existed before.

“That being the case, Courts of Law ought to follow Equity; because there should be a general rule of property: and, if the Courts of Equity say, we will presume that when the execution is for a meritorious consideration, a strict adherence to the precise form was not intended, and therefore it is not necessary; the moment the same rule is fixed and adopted at Law, every man who creates, and every man who is to exercise a power, understands what he is to do. In the construction of powers *originally* in their nature *legal*, Courts of Equity must follow the Law; be the consideration ever so meritorious: for instance, powers by a tenant in tail, to make leases under the statute, if not executed in the requisite form, no consideration ever so meritorious will avail. So with respect to powers under the Civil List Act, powers under particular family entails, as the case of the Duke of Bolton, &c.; Equity can no more relieve from defects in them than it can from defects in a common recovery. The principle upon which the rule of Construction in these cases is founded is, that there is nothing to affect the conscience of the remainder-man. Therefore it is difficult upon principles to maintain any distinction between equitable and legal execution of powers.’—*Cowp.* 266.

“It is remarkable that Lord Redesdale takes no notice of this case. Yet, if Lord Mansfield’s reasoning in it is considered with

care and without a disposition to find him in the wrong, his meaning can scarcely be misapprehended. His doctrine and that of Mr. Justice Wilmot unaltered in substance, but shaped so as to obviate the misunderstanding to which it has been subjected, may perhaps be thus expressed.

“As soon as the Statute of Uses had passed, Courts of Law were bound to ask what was the Equity, because the statute said that the Law should follow the Equity. But, unfortunately, having no Equity precedents to guide them, they took a wrong direction, and, comparing powers to conditions, which they are not at all like, held that they should be construed strictly. A long series of Equity precedents has now settled that wherever the power is executed for a meritorious consideration, the precise form prescribed for its execution need not be strictly pursued. It is true these precedents are all since the Statute of Uses; but they proceed on principles of Equity that existed before the statute, principles therefore which the Courts of Law ought to have adopted immediately upon the passing of the statute. If they had done so, there would now be a general rule of property. A clear intention to execute a power for a meritorious consideration appearing in writing, would be a good execution of the power both in Equity and at Law. There would be no occasion for Courts of Equity to exercise in these cases their peculiar authority of compelling a party to do what in conscience he ought to do. They have only been driven to exercise that peculiar authority by the mistake which Courts of Law made in not adopting equitable principles after the statute, neither would there be any occasion to adopt the questionable doctrine that a remainder-man is bound in conscience to do what the particular tenant ought in conscience to have done; for the remainder-man in these cases would be bound in law by what the particular tenant had actually done; and ‘the case of *Coventry v. Coventry*, and all the cases on jointuring powers,’ so far from being overturned, would thus rest on a more intelligible and secure foundation.

“This, as it seems to us, was the doctrine of Lord Mansfield and of Mr. Justice Wilmot to which they desired to bring back the Courts wherever they were not bound by express decisions. But they never meant to say that their doctrine had been adopted even by Courts of Equity. On the contrary, Lord Mansfield expressly says, that after the Statute of Uses, Courts of Equity reasoned as they would have done if that statute had not been made. That is to say, finding that, notwithstanding the statute, Courts of Law

did not inquire what was the Equity and follow it, and that the statute was therefore *pro tanto* a dead letter, they had no other means of enforcing Equity but by doing as they would have done before the statute,—that is to say, by decreeing such formal assurances, or adopting such other modes as would protect the parties from the effect of the erroneous doctrine adopted by the Courts of Law. .

“We have now shown perhaps that Lord Mansfield and Mr. Justice Wilmot were technically right in thinking that a clear intention to execute a power for a meritorious consideration appearing in writing, is actually a complete execution in Equity, putting Law out of the question. But at all events we have shown that Lord Mansfield and Mr. Justice Wilmot assumed that proposition, and that, if it be assumed, their whole doctrine is coherent and intelligible; at variance with the decisions at Law, and even with the decisions in Equity, so far as these last admit the correctness of the decisions at Law, but in other respects not subversive, but confirmatory of them.

“It was necessary to clear away the obscurity which hangs over this controversy before we could say with confidence, as we now can, that (with one exception to be presently noticed) none of Lord Redesdale’s or Sir E. Sugden’s arguments against permitting Courts of Law to adopt equitable doctrines, apply to our plan. Those arguments all depend upon the inability of Courts of Law to compel specific performance; but the Court we are recommending is to have that power.

“In another point of view, the long discussion into which we have been led, has a practical value directly applicable to the general purpose of this report. For we believe that nothing is more calculated to throw light on the somewhat abstruse subject of English Equity than a careful examination of this remarkable controversy.

“It is most probable, as we have already hinted, that Lord Mansfield, if he had succeeded in making his doctrine the practical rule of the Courts of Law, intended either to procure from the Legislature an express authority to compel specific performance, or to use the power of granting an attachment, which is inherent in the Courts of Law, for the accomplishment of that purpose. But however this may be, the arguments of Lord Redesdale (with one exception) have no application to any Court which is effectually in possession of such a power.

“ The exception is the argument drawn from the alleged defects of the Scotch Courts, and it is a mere sophism.

“ The Scotch Courts are bad. The Scotch Courts administer Law and Equity together. Therefore Courts which administer Law and Equity together are bad.

“ Not only is the argument vicious, but the viciously deduced conclusion is a different proposition from the conclusion aimed at by all the sound arguments which Lord Redesdale employs.

“ The conclusion deduced from the vicious argument is, that Law and Equity cannot be properly administered by the same Courts.

“ The conclusion aimed at by the sound arguments is, that Equity cannot be properly administered by a Court not furnished with powers and machinery like those of the English Courts of Chancery and Exchequer.

“ This difference, glaring as it is, was not perceived by Lord Redesdale himself (for we cannot suppose that he intended to mislead), and consequently he has not pointed it out. The result is, that among lawyers, and that large class who take their opinions upon such subjects from lawyers, an opinion prevails that Lord Redesdale has shown the project of administering Law and Equity in the same Court to be a plausible but shallow scheme which cannot bear the test of a learned and searching inquiry.” (Pp. 24—35.)

This able examination of the case is to us highly interesting, and is the best vindication of Lord Mansfield's views that has appeared.

The case of *Weakly ex dem. Yea v. Bucknell*, Cowp. 473., and other cases in which Lord Mansfield held similar doctrines, are next examined; and the fate which they met, both in England and Ireland, is stated at length.

We must make a further extract with respect to the case of *Bauerman v. Radenius*, 7 T. K., 663. This was

“ An action for delivering goods wet and ill-conditioned.

“ The principal question at the trial arose on the production by the defendant of a letter from the plaintiffs, who were the shippers of the goods, to Van Dyck and Co., entirely exculpating the defendant from all blame or imputation of negligence or misconduct, and stating that he acted in every respect according to the plaintiffs' orders by stowing the goods under their direction. But it also appeared in the same letter that Van Dyck and Co. were the persons on whose risk the goods were shipped; that they were the

persons really interested in the suit, and had indemnified the plaintiffs, their agents, in whose name they had brought this action. Whereupon it was contended at the trial, in support of the action, that, as it was disclosed that Van Dyck and Co. were the real plaintiffs, and the nominal plaintiffs only their agents, the former ought not to be concluded by the admissions of their agents, proved, too, by a letter without the sanction of an oath, and that therefore this evidence ought to be rejected: but, Lord Kenyon being of a different opinion, the plaintiffs were nonsuited. A motion was afterwards made to set aside the nonsuit; and Lord Kenyon, in the course of his judgment, thus expressed himself:—

“ ‘I have been in this profession more than forty years, and have practised both in Courts of Law and Equity; and if it had fallen to my lot to form a system of jurisprudence, whether or not I should have thought it advisable to establish two different Courts with different jurisdictions, and governed by different rules, it is not necessary to say. But, influenced as I am by certain prejudices that have become inveterate with those who comply with the systems they found established, I find that in these Courts, proceeding by different rules, a certain combined system of jurisprudence has been framed most beneficial to the people of this country; and which I hope I may be indulged in supposing has never yet been equalled in any other country on earth. Our Courts of Law only consider legal rights: our Courts of Equity have other rules, by which they sometimes supersede those legal rules; and, in so doing, they act most beneficially for the subject. We all know that, if the Courts of Law were to take into their consideration all the jurisdiction belonging to Courts of Equity, many bad consequences would ensue.’

“ Lord Kenyon then illustrates his opinion by the case of an action for a legacy. We omit the illustration here, because we shall soon have another occasion to quote it. Afterwards he proceeds as follows:—

“ ‘I exemplify the propriety of keeping the jurisdictions and rules distinct by one out of a multitude of cases that might be adduced. If the parties in this case had gone into Equity, and that Court had directed an issue to be tried, they might have modified it in any way they thought proper. One of the rules of a Court of Equity is, that they cannot decree against the oath of the party himself on the evidence of one witness alone without other circumstances: but when the point is doubtful, they send it

to be tried at law, directing that the answer of the party shall be read on the trial; so they may order that a party shall not set up a legal term on the trial, or that the plaintiff himself should be examined; and, when the issue comes from a Court of Equity with any of these directions, the Courts of Law comply with the terms on which it is so directed to be tried. By these means the ends of justice are attained without making any of the stubborn rules of law stoop to what is supposed to be the substantial justice of each particular case; and it is wiser so to act than to leave it to the judges of the law to relax from those certain and established rules by which they are sworn to decide. If the question that has been made in this case had arisen before Sir M. Hale, or Lords Holt or Hardwicke, I believe it never would have occurred to them, sitting in a Court of Law, that they could have gone out of the record, and considered third persons as parties in the cause.'

"After some remarks on the circumstances of the case, Lord Kenyon concludes his judgment in the following words: 'It is my wish and my comfort to stand *super vias antiquas*: I cannot legislate, but by my industry I can discover what my predecessors have done, and I will servilely tread in their footsteps. I am therefore clearly of opinion, on principles of Law, that the plaintiffs cannot recover in this action; and we cannot in this case assume the jurisdiction of a Court of Equity in order to overrule the rigid rules of Law.'

"There is something bordering on the ludicrous in this statement by Lord Kenyon of the origin of his opinion and of the length of time he had held it, as if forty years' uninterrupted enjoyment of a prejudice could turn it, by a kind of intellectual prescription, into a sound doctrine. It has, however, the merit of great candour, and seems almost to amount to an avowal that, if, instead of a judicial decision on what the Law was, he had been called upon as a legislator for a recommendation as to what it ought to be, he would have felt it his duty to shake off an opinion which he cherished principally on account of its inveteracy. We do not mean to say that all Lord Kenyon's expressions imply an attention to this distinction; on the contrary, in the course of his judgment, his mind appears to vacillate. Sometimes he seems to be simply declaring the Law, avoiding any estimate of its merit or demerit, sometimes to be expressing strong approbation of the Law, sometimes to be admitting that nothing can be said in favour of it by an unprejudiced person.

“ This apparent vacillation imposes considerable difficulty upon those who undertake to criticise him.

“ That a judge should not legislate, but should discover what his predecessors have done, and tread servilely in their footsteps, is a doctrine which we have no disposition to combat, at least so long as there is a legislature ready to amend the defects of the Law. But when Lord Kenyon says, ‘ by these means (the trying actions or issues under the directions of a Court of Equity) the ends of justice are attained without making any of the stubborn rules of Law stoop to what is supposed to be the substantial justice of each particular case, and it is wiser so to act, than to leave it to the judges of the Law to relax from those certain and established rules by which they are sworn to decide,’ it is not very easy to understand whether he speaks with reference to the wisdom of a judge or to the wisdom of a legislator.

“ If he means only that the judges ought to decide as they are sworn to do, and that they are sworn to decide according to certain established rules of evidence, these are propositions which we are not called upon to dispute. We may remark, however, that the latter is scarcely a true proposition. It is scarcely true, seeing that the rules of evidence have almost all been made by the judges, and from time to time altered by them, to say that they are sworn to decide by those rules as they exist at any given time.

“ But by the expression ‘ it is wiser so to act than *to leave it to the judges of the Law* to relax from those certain and established rules by which they are sworn to decide,’ Lord Kenyon seems to mean that it is wiser in the Legislature so to act. Yet, if we so understand him, the whole sentence will yield no consistent meaning. For, admitting that the judges of the Law are sworn to decide on such subjects according to established rules, still they are only sworn to decide according to such rules as are from time to time established by the Legislature.” (Pp. 52—55.)

As to the recantation of Mr. J. Buller’s opinion, the Commissioners make the following remarks:—

“ It is true, that in the case of *Farquharson v. Pitcher*, which we have discussed above, Lord Eldon says—‘ With respect to the Common Law authorities which have been cited, I may observe, that when I had the honour to sit on the same bench with Mr. Justice Buller, I had a great deal of conversation with him in respect to the equitable doctrines of the Court of King’s Bench; and though he, at an earlier period of his life, had had some share

in introducing Equity into Law, yet I have his own authority for stating that he was convinced latterly, that he had been exceedingly mistaken in his notions of the equitable jurisdiction of the Courts of Law.'—Russell's Chancery Reports, ii. 86.

"These are very large expressions, but in order to judge how far they accurately represent the change in Mr. Justice Buller's mind, it is fit to advert to what Lord Eldon says in the case of *Evans v. Bicknell*, when he is protesting against the equitable doctrines of the Court of King's Bench.

"'With regard (he says) to the second proposition of Mr. Justice Buller, that if this (the rule regarding mortgages) had become a rule of property in Equity, therefore it ought to be adopted in a Court of Law,—with great deference to the learning and memory of that judge, that appears to me a very hasty proposition.' He then proceeds to argue against the proposition, but makes not the slightest allusion to Mr. Justice Buller's recantation.

"A little further on, he says—'It seems to me rather surprising, if I may presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a Court of Law, should not have attended to these distinctions; which perhaps will be found in the very principles on which this Court exists.'—6 Ves. 183. And again he goes on to illustrate what he has been saying, but still without any allusion to the recantation.

"Now, Lord Eldon gave his judgment in the case of *Evans v. Bicknell* in the summer of 1801, very little more than a year after Mr. Justice Buller's death, and when the above-mentioned conversations in respect to the equitable doctrines of the Court of King's Bench must have been quite fresh in his memory. For these conversations must all have taken place between the summer of 1799, when Lord Eldon was appointed Chief Justice to the Common Pleas, and the Easter vacation of 1800, when Mr. Justice Buller died. And these things being so, it is a moral impossibility, that, if Mr. Justice Buller's recantation of his equitable doctrines had been general, or had been large enough to be available for Lord Eldon's purpose, he should have omitted to take advantage of it. Surely, instead of saying 'with great deference to the learning and memory of that judge,' the proposition which he laid down, 'appears to me a very hasty proposition;' Lord Eldon would have said (if he could have said so with truth), 'It not only appears to me a very hasty proposition, but I have Mr. Justice Buller's own authority for stating, that he himself was latterly convinced it was so.'

“And again, instead of saying—‘It seems to me rather surprising, if I may presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller, in a great many of these equitable principles in a Court of Law, should not have attended to these directions;’ Lord Eldon would have declared (if he could have done so with truth) that there could be no great presumption in expressing surprise that Lord Mansfield should have concurred with Mr. Justice Buller, in neglecting the distinctions between Courts of Law and Courts of Equity, seeing that Mr. Justice Buller was latterly himself convinced that he had been exceedingly mistaken in adopting that course.

“Lord Eldon gave his judgment in the case of *Farquharson v. Pitcher* in the year 1826, when more than a quarter of a century had elapsed from the date of his conversations with Mr. Justice Buller on Law and Equity; and we think it sufficiently evident, from what has been said, that he could not then have had an accurate recollection of the extent to which Mr. Justice Buller acknowledged he had been mistaken.

“To what extent he did make that acknowledgment, may, we think, be inferred from the specific instance of an action for a legacy, which instance was given by Lord Kenyon in the summer of 1800, immediately after Mr. Justice Buller’s death, and without any intimation that Lord Kenyon had understood him to have abandoned generally the principles on which he and Lord Mansfield had so long acted.

“If this be so, Mr. Justice Buller is an authority in our favour, not only when he endeavoured to extend the powers of Courts of Law, so as to enable them to do complete justice in the cases coming before them, but also when, yielding to Lord Kenyon’s arguments, he repented of having endeavoured to extend their jurisdiction over cases in which, by the defect of their constitution, they cannot do complete justice. His recantation thus explained, is a most important authority in favour of the proposition, that no Court should be suffered to meddle with subjects in which its meddling may produce mischiefs which another Court must be called in to remedy.” (Pp. 63—65.)

We have made these long extracts because we think that our readers, on finding this subject approached by lawyers, may be induced to turn their attention to it; and thus the proper degree of consideration may be given to it. We shall conclude with some observations of Master Farrer, extracted

from his evidence before the Bankruptcy Committee of the House of Lords, on the 9th of March last: —

“ Will your lordship allow me to say, that we have in the Court of Chancery in England, at the present moment, the jurisdiction both of Law and Equity under the Joint Stock Companies winding-up Act, 1848. The Master in Chancery is sitting (*quasi*) a *Nisi Prius* judge, and he is sitting (*quasi*) a judge in Equity, an equitable judge; he summons and examines parties as well as witnesses; he is judge and jury in a very short time, and he is, if I may say so, chancellor. An action at Law, or suit in Equity, is heard and decided by him, and carried by appeal to the Vice-Chancellor or Lord Chancellor. The following is the first case that came before the Master; Thomas Reaveley's case. The admissions were entered into, and affidavits made, between the 30th Nov. 1848, and the 4th Dec. 1848; on the 4th it was argued by counsel: on the 8th Dec. the Master gave out his decision; on appeal to the Vice-Chancellor, he gave judgment on the 21st Dec., and on appeal to the Lord Chancellor, he gave judgment on the 11th January, 1849.”

It is to be observed, then, that this branch of the Court, where the legal and equitable jurisdiction are united, seems to work well. We shall shortly state our own opinions on it more at length.

ART. V.—REGISTRY—TITLES TO LAND AND STOCK IN THE FUNDS.

WE have dwelt at some length in another article on the important measure for the Relief of Irish Incumbrances. We have explained the evils which have made such a measure necessary. But present relief is not all that is required.

Lord Campbell well observed, on introducing the measure to the House of Lords, “ that, unless a remedy could be found for the present evils, though the purchasers of the present incumbered estates would start afresh, free and unincumbered, they would soon become as involved as the old proprietors had been.” No question, indeed, can be more important for Ireland than this, — how such a growth of incumbrances as now entangles the transfer of Irish pro-

perties can be prevented from springing up in future? — while no time can be more favourable than the present for considering it, when the improved legislation will have the opportunity of being applied to estates extricated from existing claims, and vested, for once, under an indefeasible title in absolute owners: and we have endeavoured to show, in the article already referred to, that to England, as well as to Ireland, it is of the utmost importance to find a satisfactory solution of the same question. Such a solution we think that we are able to supply.

In previous numbers of this Review¹, we have called the attention of our readers to the existence, in this country, of a species of property of vast amount, the owners of which have long been in the continual habit of creating in it every modification of interest, without its ever happening that these interests interfered with the readiness of purchasers to buy it. But the subject is of so much importance, the example of such great value in relation to the present question, that we shall make no apology for referring to it again. The stock of the Bank of England is, as we all know, subject to every variety and modification of interest. Loans upon its security are not uncommon. Creditors may obtain a lien upon it. Life interests, and interests in reversion and remainder, are practically created in it every day. No apprehension is felt by those thus partially interested in the stock as to the security of their interests. Yet the variety of claims which may exist, or have existed, in a sum of stock, never affects the purchaser of it at all. He knows nothing of them; he makes no inquiry about them. He satisfies himself that the stock is transferred into his name in the Bank books, and goes to sleep in the undoubting assurance that he has a good title to it against all the world. Why is this? It is because, whatever limited interests exist in stock are created either by declarations of trust, of which the purchaser has no notice, and by which therefore he is unaffected, or by what is known as a *distringas*, of which the effect is only that the officers of the Bank will not make a transfer of

¹ See, *inter alia*, Vol. IV. pp. 165. 351.

the stock affected by it until the expiration of a certain short period after notice that the transfer is about to be made has been given to the person who has obtained it; but with which also the purchaser has nothing to do.

Subdivisions of interest cannot be made in stock as they can in lands. I may declare a trust of stock for A. for life, and for B. after his death, but I cannot give the stock itself in this manner. Each person into whose name a transfer of stock is properly made acquires the whole interest in it, and transmits that whole interest to the person to whom he *bonâ fide* transfers it, unaffected by any right which any third person may have upon it. A third person may, indeed, acquire the means of preventing the transfer from being made, but he has no lien upon the stock after it is made.

The one only risk to which a purchaser of stock can be exposed, is the risk of some previous transfer, through which his title would be traced, having been forged. But that risk is obviated in practice, partly by the difficulty of tracing stock, but chiefly by the doctrine of the Courts of Law, which throws the loss in such cases upon the Bank, and not on the innocent holder of the stock.¹

Now we ask, may we not learn from this example how the end we have in view can be attained? Stock is held like land by title, not by mere possession like goods; that is, the owner must show a right to it by a transfer in the Bank books. Stock can be made subject to various liens. Yet these liens do not affect the title to stock as they do affect that to land. But are there any reasons why a similar system should not be applied to the transfer of land? Cannot lands, for example, always stand in a public register in the name of some owner, who shall by an entry in that register transfer the entire interest in the land unaffected by any lien of a third party upon it, as the person in whose name stock stands in the Bank books transfers stock by an entry in them? Cannot all limited interests in land be safely created by way of trust, or protected by *distringas* as such limited interests

See Chief Justice Best's observations in *Davis v. Bank of England*, 2 Bing. 293.

in stock are every day created and protected? Or, if there are any circumstances in the nature of land which make the application of such a system to them undesirable, is it not possible to introduce such modifications of it as may meet these circumstances without sacrificing the advantages belonging to it? Let us consider these questions in detail.

It is clear, in the first place, that if we are to transfer land as we do stock, there must be the same facility of identifying the land transferred, as there is of identifying the stock to be transferred. But land is of all things one of the easiest to be identified. At this day, over the greater part of Europe, in Norway¹ and in Sweden², in the dominions of Prussia³, of Austria⁴, of Bavaria⁵, in the canton of Geneva⁶, over the whole of Italy⁷, and in the state of Belgium⁸, there exists a system of registration of dealings with land, founded upon the accurate description of the land dealt with. This description is based in Norway, Sweden, and Belgium upon maps, but in the other countries above named it is dependent only upon the same means of identification upon which those who have any dealings with land at the present day in the United Kingdom generally depend, namely, on the verbal statement of the boundaries, situation, occupiers, &c. of the pieces of land described. In Ireland there exists a complete and admirably executed ordinance map, on a scale of six inches to a mile, which, though it would require enlargement in the case of very small pieces of land, would yet afford, as we think will be apparent to any one who will take the trouble of inspecting it, a most valuable aid, in the identification of land, to any verbal description, and in very many cases might quite supersede the necessity of any other description than a reference to numbers marked upon it.

Let it be supposed then, that we are in possession of a description sufficiently identifying the lands with which we are to deal.⁹ Let it be supposed that every such description

¹ 2nd Report of the Real Property Commission, 464.

² *Ib.* 467.

³ *Ib.* 459.

⁴ *Ib.* 458.

⁵ *Ib.* 444. and 462.

⁶ *Ib.* 521. E. S.

⁷ *Ib.* 473.

⁸ Mr. Stewart's Lectures on Landed Property, 111.

⁹ We have supposed, as the simplest case, that of the lands themselves. In

is deposited in a register office, where it is arranged under the head of the parish, hundred, barony, or county where the lands are situate, and is distinguished by a number; and that to this number a page is appropriated in a book, which we will call the Register of Legal Titles for that district. Let all the subsequent transfers of the lands included under this number be entered either under the account thus opened, or, if they relate to part only of these lands, under new accounts opened for the separate parts, to which references are made from the original account. What is there, under such a system, to prevent these separate parcels of land from being dealt with as the separate sums of stock are dealt with now? And is it not clear, from our experience of dealings with stock, that if the transfer of land is so dealt with, however much involved the owner of any lands might be, the difficulties which now attend the sale of incumbered estates could not by possibility occur; that, although some delay might take place,—although creditors who had obtained a distringas on particular lands might require to have the proceeds of the sale of those lands brought into Court and distributed among them, still the title to each fresh purchaser would be always clear, the persons with whom he had to deal would be few and easily ascertained, the right given to him by those persons indefeasible;—and that thus we should produce a system which combined full security to the creditor who availed himself of his rights, with the utmost facility in the disposal of the property for the benefit of those who are entitled to have it disposed of.

It is true, that to obtain this facility of transfer we shall have taken away from the debtor a right which he now enjoys,—the right, namely, of acquiring a general lien over all the real property of his debtor, available against it even in the hands of a third person. But, in the first place, this is a right which the creditor, in our judgment, ought not to possess; and, in the second place, while we take this right

the more complicated one of lands subject to a perpetual right, as *e. g.* that of a tithe rent charge, each of the two parts of which the whole beneficial interest was composed, the lands subject to the rent charge, and the rent charge, would form a distinct subject of description, as if they were distinct lands.

away, we have it in our power, by the operation of the same system, to confer upon the creditor additional facilities for obtaining the satisfaction of his just claim, which will amply compensate him for what we take away. We say the present right of the creditor is one to which he is not, in justice, entitled. For how can a person who has not lent his money on the security of any particular property, who has relied for payment solely on the general solvency of his debtor, justly claim to enforce payment against property which has ceased to belong to that debtor, which has passed into the hands of a third party, who has given that debtor a fair equivalent for it, and against which, while it belonged to his debtor, he took no measures to enforce his claim? Such a right, then, we take away. On the other hand, the creditor may fairly ask for facilities to discover what property his debtor possesses,—for facilities to make that property, when it is discovered available, for payment of his claim. We have seen that the proposed system would secure him the latter of these reasonable claims, since the property will be always available for sale; and, by means of alphabetical indexes of names, in which all the registered property belonging to each person is brought together by references under his name, it will be easy, as will hereafter appear, to ensure to each creditor the means of ascertaining what property his debtor possesses available in discharge of his demands.¹

But although we shall thus have made sufficient provision for the just claims of the general creditor, the proposed system

¹ We may observe, that in the canton of Geneva, and over the whole of Italy, the registers are kept upon this principle; the different pieces of land belonging to each owner being entered, by numbers referring to the description of them, under his name in one common account. (*See 2nd Real Property Rep. pp. 473. 521.*) Such a system of registration, combined with an index, by which the devolution of the different pieces of land could be traced, might, we conceive, be made as effectual for the transfer of land as the converse system which we propose, and would offer greater advantages to general creditors, by exhibiting at one view all the real property of their debtor. On the other hand, it would subject purchasers and mortgagees to the necessity of tracing the title to the land purchased by or pledged to them through a succession of accounts, whereas upon the other system, which we prefer, all the dealings relating to the same land would be collected under one head.

would not secure all which our habitual modes of dealing with land, and our feelings respecting it, require. The number of limited interests which men wish to create in land, is greater and more various than those which they wish to create in stock. Leases for long terms of years are of constant occurrence. Mortgages of lands are more common than mortgages of stock. Settlements of land are apt to extend, in possible anticipation at least, over a greater length of time, and to create a larger number of contingent interests than those of stock. Again, the improper alienation of particular lands from the family of a settler would often be felt as a grievance, even if compensation in value were obtained; whereas there can be no such local attachments to sums of stock. Provisions which are not requisite in the case of stock are therefore wanted to meet the case of these varied interests. Can this provision be made without abandoning the essential characteristics of the system of dealing with land, which we have above explained? It appears to us that it can, and in more ways than one. One mode, which is entitled to much consideration, as being that adopted by Mr. Robert Wilson, the original suggester of the proposal to apply to the transfer of land the machinery used for the transfer of stock¹, consists in allowing transfers of land to be made upon the Register of Legal Titles, for limited terms of years, or by way of mortgage. Limitations of estates directly to unborn persons, he would, however, require to be made in all cases by way of trust.²

¹ See Report of the Law Amendment Society, 4 L. R., p. 351, 352.

² In a pamphlet upon the subject of the Registration of the Title to Land, recently published by Mr. Vansittart Neale, which has been noticed in our last Number, and which recommends the adoption of Mr. Wilson's plan for transfers of land, we see that it is proposed to allow a still greater deviation from the principle adopted in transfers of stock, namely, by permitting estates for life or in remainder to be limited directly by entries upon the Register of Titles. The objection of inconsistency which we have urged against the amount of deviation proposed by Mr. Wilson, from the rule of making each entry on the register of titles pass the whole interest, does not indeed apply to Mr. V. Neale's proposal. But if it is more consistent than Mr. Wilson's, it would be less effectual. The embarrassments now attendant on the transfer of land would, we fear, to a great extent remain unremoved. We fully concur with Mr. Vansittart Neale in the importance of a system of registration, which shall keep legal titles distinct from

There can be no question but that a great advance towards a perfect simplicity of title would be effected by this plan. But it stops short of that complete singleness which gives to Bank stock its unsurpassable facility of transfer; while the degree of deviation from the strict rule of making every transfer of the legal title pass the whole interest which it allows, subjects it to the objection of an arbitrary selection of the point at which to stop. If the mortgagee of an equity of redemption, or the tenant of a term for a few years, is entitled to have his interest placed upon the Register of Legal Titles, as Mr. Wilson proposes, on what principle can the tenant for life, or the tenant in tail, if alive, be excluded from it; yet, if these interests are allowed to be entered on that register, it seems a somewhat arbitrary proceeding to exclude from it the interest of an unborn tenant for life or in tail, as Mr. Wilson proposes to do. Mr. Wilson seems to have reasoned thus: Men want in certain cases to confer the absolute interest in their property; they want in other cases to confer limited interests only in it. If you allow them to split up the entire interest indefinitely, into as many limited interests as they want to create, it becomes so subdivided that the trouble and difficulty of collecting together all the fragments again, when the entire interest is to be conveyed, greatly interferes with the performance of that operation. I will therefore limit the extent to which the splitting shall take place. They shall make as many fragments as they like, so that they find a living hand to hold each; but they shall not reserve any for the unborn. The power of subdivision shall be confined to two dimensions. Horizontally, they may cut up as much as they please, but, vertically, they shall be restricted to a life or lives in being.

We are ready to admit that positive regulations must sometimes proceed on a system of compromise. In order to be practically useful, we may occasionally be compelled to be theoretically inconsistent. But the inconsistency is to be

equitable interests. But he does not appear to us to appreciate sufficiently the importance also of preventing the legal title from being split up into a variety of interests less than the fee simple, upon which we have more to say.

lamented. It is always to be lamented when we are obliged to give up the *best* means of attaining one good end, for the sake of providing for another end, also desirable. It is still more lamentable when this is done upon the introduction of a new system. And if we can point out a way of enabling the owners of any lands entered upon the Register of Titles, to create as many limited interests in those lands as they choose, and to secure those interests against risk, while at the same time the legal title to the lands shall always remain an undivided whole, ready, as stock always is, to be transferred unbroken to any purchaser of the entire interest, we think Mr. Wilson will admit that we have suggested an improvement upon his plan. We think that we can point out two modes by which the end proposed can be attained: the first being an extension only of a suggestion made by Mr. Wilson himself.

Both of these modes depend upon the establishment of that which Mr. Wilson has suggested as part of his scheme; namely, a second register, which we will call the Register of Equities. This register, like that of titles, would be founded upon the local description of the lands registered. In it would be made entries of all transactions relating to limited interests in these lands, classed, so as to bring together all the transactions relating to each distinct interest, in a consecutive series, under a distinct head; the instruments creating these interests, or copies, being deposited in the office for reference. Now Mr. Wilson has proposed that persons who, under any instrument entered on this Register of Equities, could show a claim to prevent the sale of any property standing on the Register of Titles without their consent, should have the right of protecting their interests, by entering with the Registrar a caveat against the sale of the land; the effect of which, like that of a *distringas*, which would be entered on the same Register, should be only to entitle him to notice before any transfer could take place, so that he might take legal steps to prevent it. Here we have at once a means by which all interests less than the entire fee may be protected by the persons interested in them, without interference with

the unity of the legal estate.¹ By means of a caveat, the mortgagor might transfer his property into the name of the mortgagee, while he guarded himself against any improper dealings by the mortgagee with the property so pledged; or the lessee might protect himself against a sale in fraud of his interest by his lessor, or the converse. At the same time the whole transaction would be withdrawn from the knowledge of the purchaser; and no record of it would remain, after a sale had taken place, to embarrass the future transmission of the property to which the caveat once applied.

The employment of caveats would, as we have seen, be an extension only of the familiar practice of *distringas*. By a modification of another practice, with which we are also familiar in the case of stock, the fullest protection might be afforded to all limited interests in lands entered on the Register of Legal Titles without the necessity of resorting to caveats, and without interfering with the indivisibility of the legal estate.

Upwards of 50,000,000*l.* of stock are now standing in the name of the Accountant-General of the Court of Chancery. In this stock any kind of equitable interest may be created by the parties interested, without troubling the Accountant-General. But if you wish to have the corpus transferred, you must satisfy the Court, whose officer the Accountant-General is, that you have a right to call for the transfer. An Act, of which a more detailed notice is to be found in a previous number of this Review², has increased the facilities before existing for bringing stock affected with trusts under the protection of the Court of Chancery; and, as it seems to be generally approved of, shows the advantages of the system. We do not wish to impose upon the owners of landed property the necessity of having recourse to the jurisdiction of the Court of Chancery in order to obtain security for limited interests. But we think that we may safely borrow from its machinery so much as consists of the appointment of some

¹ This Register of Trusts would afford the creditor that means of ascertaining all the liabilities on any property of his debtor to which we alluded above, p. 313.

² 8 L. R., p. 369.; the Trustees' Relief Act.

public officer, into whose name any parties desirous of creating limited interests in land might transfer the land, as Protector of the Legal Estate, which should pass without conveyance to the person for the time being filling the office, to the account of the several persons beneficially interested in it. We would suggest the Chief Registrar as an officer who would be well suited for such an office.

The duty of the officer in whose name any lands were thus transferred, as we conceive it, would be only to satisfy himself that no part of the corpus of the estate was parted with, except on the application of those persons who were equitably entitled to dispose of it. It is true, that when stock is transferred into the name of the Accountant-General, the dividends can be received only through his orders. But that arises from the circumstance of the Bank refusing to pay dividends to any persons but those in whose name the stock stands. There would be no necessity for any such interference on the part of the Protector of the Legal Estate with the rents arising from the lands protected. According to our conception of his official position, he would have nothing to do with the receipt or application of rents, or profits. The management of the lands, the granting of leases, the collecting or enforcing the payment of rents, the appropriation of the rents in discharge of jointures, of annuities, of interest, &c.; all these active rights or duties would be left to the parties authorised or appointed to exercise them, as at present. He would be no party to the assignment of mere equitable interests, of the lease or mortgage, of the reversion, or the right of redemption, all of which might be protected by the transfer into his name. Now it must be borne in mind, that under a system of registering equitable interests, such as has been suggested, these interests could be dealt with with more security than legal estates are at present. The utmost freedom in dealing with their property by creating or transferring equitable interests and sub-interests, would therefore be possessed by the persons beneficially interested in an estate standing in the name of the Registrar. The rightful enjoyment of their property would in no way be interfered with. That large class of limited interests created by leases for short terms of years to occupying

tenants, which are intended only as a means of making property available, might properly be made binding upon purchasers, as was provided in the plan of registration recommended by the Real Property Commissioners, though not registered. There would be no analogy between such a position and that of persons whose property is under the management of the Court of Chancery, except the one valued characteristic of security. The lands could not be conveyed away but by the act of a public officer ; and however long the duration of the limited interests created in it might be, all parties interested might feel secure that they would not suffer from the infancy, the incompetency, the ignorance, the absence, or the roguery of the person in whom the legal estate was vested.

To sum up, then, in a few words the system we advocate, as combining, in a greater degree than any other with which we are acquainted, security and facility in dealings with land, *inter vivos* : it is as follows :—

To sever in land, as is done in stock, and, we may add, in shares of every kind, the legal from the equitable title.¹ To make every transfer of the legal title convey the whole interest in the land transferred, as it does now in the case of stock and shares. To give to persons, such as judgment creditors, having claims upon the land not protected by a trust the same right which a creditor now obtains by a *distringas* upon stock ; that is, the right of leaving notice of an intended sale, so that he can apply to the Courts as to the application of the purchase-money, instead of that fatal right which a judgment creditor now possesses, of a lien upon the land, affecting it in the hand of a purchaser.²

To give a similar right to *cestuique* trusts in cases where the trust deed makes their assent essential to the sale of the trust lands.

¹ For the benefit of our lay readers, we state that by the *legal* title we mean the right to the possession or the receipt of the profits of any property, without the intervention of any other person ; and by an *equitable* title we mean a right on any property enforceable only through the intervention of another person in whom these direct rights are vested.

² The abuse of this right might be guarded against by giving owners a summary power of applying to have any *distringas* removed from any particular lands, or satisfying the Court that the debtor had ample security upon other lands.

To give to persons desirous of creating limited interests in land the right of vesting the land in some public officer or officers—such as the Chief Registrar for the time being—as protector of the interests thus limited.

We are conscious, however, that there is still a deficiency to be supplied in the plan suggested. It provides only for the transmission of land by the *living*: what is to become of it in the case of the *death* of any party in whose name it stands? Is the legal estate to pass to the heir in trust for the devisees, if there be any? and is the Registrar to decide who is the heir? or is it to vest at once in the devisees? and is it to be the duty of the Registrar to determine, at least *primâ facie*, in whom it is vested, and to make transfers in the register accordingly?'

We confess that we are in favour of a third proposal, which may seem a bold one, but which, we believe, would be a safe and wise boldness. It is to extend to all land entered on the Register of Titles the provision which works so well in the case of stock, and to enact that it shall vest, as stock does, in the executors or administrators of the person, or the last of the persons in whose name it has stood—whose duty it would be, after the land had been formally transferred into their names by the Registrar, to hold it as they now do stock, for the persons entitled, and make all proper transfers accordingly.

The duty of the Registrar in respect to transfers of land would thus be assimilated to that which the officers of the Bank daily perform with perfect success—the duty, namely, of satisfying himself as to the identity of the persons who purposed to make a transfer with those in whose names the land to be transferred stood, or of the deaths of any of them who were alleged to be dead, or of the fact that certain persons were the executors or administrators of such deceased persons. We have the long experience of the dealings with Bank stock to assure us that this duty can be easily and well performed in regard to stock. Is there any reason for doubt, that it would be as easily and as well performed in regard to land?

The measure to which we alluded in the commencement of this article affords, as has been already noticed, an open field for the introduction of such a plan as has been now detailed.

The purchasers from the commission will start free — they will be the absolute owners of the land. There can be no necessity for encumbering the deeds which will transmit the best title to it by any covenant for title. They may be, therefore, as concise as the deeds which now transmit the title to stock. The same facilities for execution by powers of attorney which now exist in the case of transfers of stock might therefore be easily afforded in the case of transfers of land: and though, in our opinion, the business of the Transfer Office should be conducted in Dublin, yet we have little doubt of the utility of establishing local offices, whence powers of attorney could be obtained, and where they could be executed or received — where deeds declaring trusts could be left for transmission to the Central Office, and in which copies of so much of the general registers as related to lands in the particular district, both of that which contained the chain of transmissions of the legal estates, and that which preserved the record of the equities affecting them, may be kept for inspection.

No system of registration can guard the purchaser of a merely equitable interest from the possibility of some complication of title. It can provide only that there shall be no concealed claims existing which can start up afterwards in priority to him. But the purchaser of the legal title would have, upon the plan suggested, a very easy task — he would have no long instruments to inspect — he would have no doubtful claims to balance. The evidences of death, which alone would not appear upon the face of the register, would be always preserved and accessible in the office; for, as we have seen, it would be the duty of the registrar, as it is that of the Bank officers, to require the production of this evidence before he permitted a transfer to be executed by the survivors or representatives of those in whose name the lands were registered; — he would have to guard against one danger only — that of the successful forgery of the signatures to any of the deeds by which the property had been transmitted within the time of legal prescription — a danger, be it observed, to which he is equally exposed, as one of many greater dangers besetting him at present, and against which the adoption of a

plan suggested by Mr. Wilson would furnish a very effectual security.¹

This plan consists in issuing upon every new entry in the register a certificate, signed by the registrar, stamped with the seal of the office, and distinguished by a particular number, without the production and surrender of which no new transfer would be made, unless by order of some court. As the number of each certificate would change on each dealing with the land, and the owner might be allowed, at any time, on surrendering his existing certificate, to obtain a fresh entry in his name, and a new certificate, the attempt to forge a certificate would involve a probability of detection, such as must, we conceive, destroy all danger of its being successfully attempted. These certificates, which might also be granted in respect of interests, appearing upon the Register of Equities, would serve also, as Mr. Wilson has observed, as a security by way of equitable mortgage, where the owner of such a registered interest might be desirous of obtaining a loan for a short time upon the credit of it.

We have hitherto dealt with the case of lands supposed to be sold under the provisions of the Incumbered Estates Act in Ireland. We have assumed that, by the extraordinary interposition of the Legislature, the present purchasers start with a clear title; and our aim has been to show how each successive owner can retain the power of creating in his property all the varied modifications of interest which the law now permits, and yet transmit to a new purchaser a title as clear and as indefeasible as the original purchaser will possess;—how, it is possible, by separating the record of equities from that of the legal title, by converting all limitations of interest less

¹ We have already alluded to the circumstances which, in the case of stock, practically exempt a purchaser from all danger on this score; namely, the difficulty of identifying stock, and the doctrine of the Courts that the Bank Directors, through whose hands the dividends pass, contract with each *bona fide* holder of stock the obligation of paying him a proportionate amount of dividends, which they cannot escape from by showing that he claims through a forged transfer. In the case of land there can be no difficulty as to identity; and the registrar, even if he could be considered responsible, could not pay. The purchaser, therefore, would be liable to eviction, if it could be shown that he claimed through a forged transfer, since such a transfer could convey nothing.

than the fee simple into equities, and by a simple mode of protecting them, to secure, in the case of land, the advantage which we now possess in the case of stocks; namely, that however much we may fetter our power of dealing with it, the fetter has no longer duration than that of the interests it was intended to protect, and does not hang over the estate, as a danger to be guarded against by the transferee, for years after it has ceased to exist as a substantial obstacle to the transfer.

But it may be said, is it possible to apply this system to lands which have not passed through the purifying fire of such a commission as the exigencies of the times have given birth to in Ireland? Undoubtedly it is possible, the difference being only that the beneficial effects of its introduction cannot be felt so soon; that the slow advance of time must be looked to for the gradual extinguishment of existing claims; that, instead of acquiring at once the certainty of an absolute title, a purchaser would acquire only the assurance that he could be affected by no claims posterior to a date which each successive year removed to a greater distance; and that, if a cloud still hung over the part of his title anterior to his own possession, he was advancing with each year further into the unclouded sunshine.

It must be borne in mind that the absolute certainty which has been dwelt upon as accompanying the transmission of title upon the proposed plan, would arise simply from the form of the conveyance by which each link in the chain was constituted. The case of Bank stock will make this at once clear. There is no act of parliament giving any special validity to the transfer of stock. But every transfer is in this form, "I. A. B., in consideration of £——, transfer to C. D., his executors, administrators, or assigns, all my interest in the sum of £——, £3 per cent. consolidated annuities standing in my name in the books of the Bank of England." To apply this system to lands either in England or Ireland, not conveyed under the commission, some such enactment as this would be sufficient,—that after a certain time no conveyance of any lands *inter vivos* shall have the effect of passing the legal estate therein unless it is made in the

Register of Legal Titles for the district where the lands are situated; that all conveyances made in this register shall be in a prescribed form, analogous to that in which the transfers of stock are prepared; that a conveyance in this form shall vest in the persons to whom it purports to be made, their executors, administrators, or assigns, all the estate of the conveying parties in the lands to which it relates, just as if those lands were chattels real; and shall imply on their part, so far as they are beneficially interested in the property, covenants for title in a form similar to that generally customary in conveyances of land;—lastly, that any owner of lands shall be at liberty to convey them upon the register, to himself, his executors, administrators, or assigns, and shall thereby vest all the estate in the lands of which he was possessed at the time of the conveyance, in himself, his executors, administrators, or assigns. So that any person might put the register in operation upon his own lands during his lifetime if he pleased. Here would be nothing which could arbitrarily interfere with any right. No investigation into the title by which any estate was held. It would not be necessary to take any notice of heirs or devisees. The operation of settlements, of sales, of mortgages, and of conveyances, made for the purpose of putting the register into operation, would bring all the lands in the country upon the register in a few years; and as each entry on it was made, Time would begin, in respect to the lands so entered, his sure and beneficial work.

Meanwhile the Register Office would afford a safe and convenient place of custody to persons who were willing to put their existing titles on record, and deposit the evidences of them for the benefit of those who might thereafter have dealings with their lands.

The change which public opinion has undergone within the last few years, in regard to the possible advantages to be obtained from the registration of land, (of which the best evidence may be found in the reception given to Mr. Drummond's bill in the House of Commons, when compared with that given some years since to the measure proposed by the Real Property Commissioners,) leads us to hope that some

comprehensive and well-considered measure on this subject will speedily be introduced into Parliament; applicable, if not, as we desire, to all lands, English and Irish, yet at least to those which may be sold in Ireland under the operation of the act relating to encumbered estates there. From the information which has reached us, we have reason to believe that the importance of *separating the registration of legal titles* from that of *equitable interests*, is duly appreciated by those members of the House of Commons to whom the consideration of Mr. Drummond's bill has been committed; and if rumour is not wholly faithless, there is much reason for believing that views of a similar nature are entertained by some at least of the Commission, whose labours upon the subject of registration are understood to be now drawing to a close. We may be allowed to express the hope that any future scheme for registration will embrace not only this important principle, but the not less important principles upon which we have dwelt; namely, that of *not allowing the legal estate to be split up into estates less than the fee simple*; and, as a natural consequence, that of *not allowing any lien upon the legal estate to affect it in the hands of a bonâ fide purchaser*.

We repeat, that the simplicity of title, and consequent facility of transfer, enjoyed by Bank stock, depends chiefly upon this circumstance, that each transfer passes the whole interest; that all limited interests exist only as trusts, or as claims incidentally preventing dealings with the stock affected by them while they last;—obstacles which the vendor of the stock has to overcome before he can sell it, but of which the purchaser knows nothing, or need take no notice, and which therefore never interfere with his power of dealing with the stock.

It is very obvious that this is the end which Mr. Drummond had in view in his bill; though the framer of the bill did not sufficiently perceive the conditions under which alone it is attainable. We have no hesitation in saying that this end is, in our opinion, the one to be aimed at. Is it not reasonable that the purchaser should be able to say to the vendor, "I know and want to know nothing about any difficulties you may have in selling your estate. If there are claimants upon

it, settle with them yourself. I want the estate free from all claims." Is it not reasonable that the law, while it protects such claimants from being defrauded, should put the vendor into a situation to be able to comply with this demand? Now the law at present does this in the case of stock, but not in the case of land. We say that it ought to do so.

We have endeavoured to point out the method by which the end we seek, the *power of transferring land free from all claims*, may be attained consistently with perfect security to all the limited and partial interests which the wants or fancies of men may induce them to create in the lands of their possession. We are satisfied that this method is practicable, and could be easily put into operation. We are certain that the facility of transfer which would result from it, would be in the highest degree beneficial to all who are interested in landed property; and we hope, before many years have passed, to see the time when it will appear as strange to suppose that the existence of numerous creditors having claims upon a landed estate can form any difficulty in making a title to a purchaser of it, as it would now appear were the same proposition asserted concerning a sum of 3l. per cent. consolidated annuities standing in the name of the debtor in the books of the Governors and Company of the Bank of England.

ART. VI. — PROFESSIONAL REMUNERATION.

OF all the topics which claim the attention of the law reformer, that of Remuneration is the most difficult; and, looking at its effects on other matters, most important.¹ It is a mere truism to say that, if men work, they must also eat; that work cannot be done without agents and instru-

¹ This article must be considered as one of a series, following several to the same end that have preceded it (see art. on Law Literature, 8 L. R. 265., and The State of the Profession, *antè*, p. 148.), and preceding others, in which it is intended to touch (as was promised) on the various topics indicated in the article last referred to. The article-writer, like the sermon-writer, finds himself bounded — by space of page, if not by space of time.

ments; and that both must be created, trained, and maintained. The public must pay for its whistle. If they would have good laws, they must provide the means of making good laws; or, if they prefer the pleasures of litigation on the doubts to which bad laws must give rise, they can have their indulgence only upon the terms of maintaining courts and judges, and their officers; advocates, attornies, and an army of legal agents of all grades. If, moreover, they would avoid those feuds and quarrels which, even under the best laws, will take place, and yet prefer present ease and comfort to the sober duty of transacting their own affairs in a business-like manner, they must pay also for this luxury. In this world of work, no good thing comes without exertion continually and systematically applied, and, somehow or other, paid for.

Truisms these, but truisms universally disregarded. We hear most bitter complaints of the Court of Chancery from men who, through the whole course of their lives, have been at no pains to do any one thing with decent regularity. The judicious arrangements which have been made for settling once and for ever the question whether an act have been done or not, they disregard at the right time. Questions arise; every fact and occurrence is disputed; and then the world is to be ransacked for evidence; and, out of the chaos of circumstances ill defined, the Judge is called upon to give a certain application of the law. If, instead of relying upon the future to solve questions that admit of no solution, we would anticipate difficulty by doing our business in a proper manner,—which, as we can seldom do it for ourselves, involves the employment and payment of suitable agency,—we must be prepared for the cost. Each person, in his own pursuits, recognises the soundness of his own claim; but, the name only being changed, he cannot recognise it in another.

But although it be admitted that the labourer is worthy of his hire, the manner of it yet remains a question of great difficulty and importance, both to himself and the public. The guerdon may be exacted in such a shape as to limit the work,—limit the amount to the labourer, and forbid the employer to employ the service he needs ever so much, or even where he cannot avoid the employment, impose an op-

pressive burden without giving to the employed an adequate remuneration. In commerce this state of things has been cured by various means;—by removing unequal and oppressive taxes, by opening to the competing craftsmen a wider range of employment. Why should not the law craftsmen take note of these effects, and counsel themselves by them?

One of the principles that have most obtained in trade, and perhaps operated far more powerfully and effectually than any other, has been the employment of mechanical means if possible, and at a cost which has had the effect of giving directly or indirectly certain employment to much larger numbers; and to the public an almost unlimited enjoyment of works of the most perfect kind.

It is otherwise with legislation and law and the administration of affairs, the most backward of human things, and a hindrance to the improvement of others; and we attribute this state of affairs to the stolidity of the lawyers, who resolutely, not to say obstinately, refuse to take lesson from all that has taken place around them, and at once bless the country and themselves!

The inducement—the principle and mode of remuneration—is the spot whereon the legal Archimedes must rest his machine whereby to move this world of difficulty. Now in considering the matter, we must not, as the fashion now is, sacrifice some forms of remuneration to others, but rather inquire to what service each is best suited, and whether, though the service be repaid by fees, the proceeds should not undergo a different distribution. From some experience, we like the reward in whatever shape it comes; and have found ourselves duly moved to exertion by each kind. We confess that our activity has been somewhat more active and constant when each item of exertion brought its allotted reward; but we have been dismayed by the amount when the time for claiming it has arrived, and our delicacy (though not wanting in decent boldness) has at times shrunk from the vindication of the means by which it has been made out. A sum for the job has had the merit of relieving us from this embarrassment, but it has not had the gently stimulating effect of the method *per fee*; and we fear that the client has lost sight of the items

of exertion by which we have earned our claims, which he has been apt to associate with our more recent efforts, without regard to those which preceded them, and which were not only more laborious and difficult, but necessary preliminaries and antecedents to those which he is disposed to recognise.

The honorarium, when accorded with an appreciating spirit, is the apt solution of many difficulties; but, like the dole to the beggar, or fees to other mercenary, it comes to have a fixed amount expected on the one side, and reluctantly accorded with a calculating spirit on the other; and then it loses its virtue, both as an honorarium, and as a fee: for the grudging client learns to pay it without reference to the market value of the service; and, taking advantage of the customary rate, neither pays it as a consideration for the service nor as a generous tribute from his ability to the unmeasured and unmeasurable aid which has been or is to be afforded.

At this stage we have arrived in our professional emoluments. They bear no relation to the service, and are paid and received as more and less than the professional due.

The suitor cannot be expected, in estimating the cost of defending his freehold, value so much, or of receiving a debt of such an amount, to bear in mind how many years were expended (if haply they were expended) in poring over law books, in attending court and assizes, in hope, not brief but briefless, of the future, — expended in a costly education at school and at college, in hall and in the waiting at court, and which must be included, to a greater or less extent, in the reckoning, if, on the present footing, we would have able and intelligent legal agents.

Few are aware of the large amount of public service done by men of fortunes large enough to afford a bare subsistence yet too small to provide the gentlemanly indulgence of a wife and family, with the customary luxuries of the day. Their energy and force of character — the intelligence and real refinement of the age — will not permit them to saunter life away. They seek occupation, sometimes the most arduous, for occupation's sake; beguiling themselves with the idea that

though not repaid by the present effort, it will lead to better things, of which there are a few examples which serve to strengthen and sustain the delusion, for the benefit of the public.

A different regimen is necessary for the solicitor and for the barrister. The former should become more and more the man of business; the latter more and more the lawyer. If the qualifications and arrangements of the former were of such a nature that he could be engaged in a larger range of service, and his remuneration, as his service should be, of a more constant and less occasional character, it would be less difficult to adjust the remuneration on a principle really remunerative to himself and not extortionate to his clients; while the employment of the barrister in a larger range of employment, which the man of business would find it more convenient to dispense with, would probably have similar effects.

The employment of the attorney as the man of business is now especially needed. It implies, however, the possession of many qualifications for which he is not at present remarkable. He should be a good accountant; a man of regular business habits (something of the merchant, something of the official); and his arrangements should be of such a nature as to admit of the orderly and prompt despatch of business.

To assist this improved state of things, he needs many facilities — facilities which would make his labour more remunerative and more effective.

Instead of asking for the abolition of the certificate-money, he should demand that it be so disbursed as to give him a fair return; and if it be not levied on all classes of the profession alike, that the exempted should be made to bear the burden to the same good end.

The ignorant impatience of taxation has never been shown so markedly as in the claim for the abolition of this tax. The claim should not be to abolish the tax, but to apply it to the benefit of the profession and of the public whom it serves.

It is not merely a Chancellor of the Exchequer's notion, but that of every prudent man, not readily and without the

weightiest cause to part with a capital or fund once created unless it be impossible to apply it productively.

In the present case the fund admits of being applied to purposes of the greatest importance and productiveness.

The profession is cursed with a most costly and inefficient body of law, which the life of man cannot enable him to master, even with the best energies; with a body of law records in the shape of reports equally impracticable; with a law literature, voluminous, inaccurate, error-creating and error-perpetuating; and the law is so inextricable a wilderness, that the profession, who should be men of business, only more highly informed and highly skilled, because, to the ordinary practice of law they add a knowledge of the laws by which men are to be governed, and of the consequences of disregarding them, must needs be deficient in one-half of the requirements of their calling.

Now, if the capital levied upon the profession were applied, by means of the services of lawyers themselves, on a systematised plan, in consolidating the law, in the production of well digested reports, and in the publication of completer text writings, the profession at large who are engaged in active agency would find their work much facilitated, and a legitimate provision would be made for a class of service which is very ill requited in all professions — a service not improperly made a charge on the rest of the profession, since, by its means, they are enabled to realise their gains.

We earnestly implore the profession to consider well before they abolish this tax; but rather seek to make it the grand resource by which they shall regenerate their profession for the common weal.

It would be among the advantages of a minister of justice, that the judicial budget and its application would become a subject of distinct consideration in Parliament and elsewhere.

The tax in question produces a large annual revenue; let the whole profession holding official employments of a legal nature be taxed one per cent. for the same purpose, and a fund would be raised adequate to the most extravagant projects of law reform, and, by judicious organisation, the reign of Victoria might be distinguished as that of Justinian

was by a reduction of the law into forms — call them codes, consolidated statutes, text books, or what we will — which shall be more manageable; and leave to the poor practitioner time for the more essential requirements of business, and the means of vindicating himself from the charge of costly and useless impracticableness.

The Duke of Wellington well said once, “we must not have a little war.” Plagiarising the idea, we may say that we must not have mock business, a servile adherence to forms, a disregard of essential objects.

But this matter of forms is at the root of the best and most available scheme for regenerating the profession. Instead of printing them in the law books to be copied out and applied, let them be printed in the veritable form in which they are to be used. The thing is done now, but not upon system; nor by authority. The forms of which we speak, should be prepared by the most skilled heads, and systematically used. The profits on the sale (let the profits be ever so small) would yield a large return.

We speak of forms of every kind. Every act has its appropriate form; embodying the needful conditions of the act. If it should be necessary for a special purpose to vary the form, the variation might be made preserving the form in other respects.

The aid of the printer should be invoked to apply the expressiveness of type, a resource peculiarly valuable in legal documents.

Let the pleaders and draftsmen and conveyancers, whose vocations are falling away, bethink themselves whether, following commercial principles in cheapening the article for the means of the least favoured conditions, they may not, by the multitude of transactions, obtain the largest returns.

We doubt not that this idea will be reduced to practice, but it will be after the old fashion. The skilled workman will design and realise the idea, the master of capital and mechanical resource will reap the profit. We are desirous of seeing fair play to both parties, and of uniting them in an enterprise by which each will realise a due return.

The booksellers, as we observed in a former number, do

not probably make more than an adequate return, but it is in a shape which narrows the market, denying both to the public and to the author advantages which they ought to derive; with a more extended market, effected by a better adaptation of the wares to the wants of the consumer and to his means of purchase, the author would obtain returns rivalling those of Sir Walter Scott. Books are written chiefly for the practitioner, who is compelled to pay a heavy price for them. When they are written for more popular use, it is supposed that they should be written more loosely. It appears to us, that the book for popular use should be the same as a book for the practitioner, full and precise as to the general details, but omitting subordinate details; references to authorities, and matters of mere practice. Books of this description, written by able professional men, for each class of persons, giving not merely the general principles of law, but remarkable cases of actual occurrence, illustrating the application of these principles to their own concerns, would have a wide circulation, and diffuse such a knowledge of law among the people, as would lead to the appreciation of lawyers, and, what is more to our present purpose, yield a revenue to its professors.

The standing counsel and agents for each profession and business—if such a wise expedient should come into use—should be charged, as a practical duty, with the publication of such works and of cases in the Courts as they should occur.

There are 3000 counsel in the Law List. Many of these have found their abiding-place in some lucrative office. Some have retired to their country seats to enjoy the *otium* of a landlord proprietor, *cum dignitate* of the justice of the peace; others have gone to practise in the colonies; and some happy fellows have a full practice, engaging them in the active receipt of well-earned fees; probably the greater number enjoy the *otium cum povertate* of brieflessness.

If these were to allot to themselves the legal representation of all personages known to the law with the task of editing publications such as we have described, they would no longer pine for profitable occupation, and the world would be better

served; realising a fair revenue by their publications, the rate of fee for attendance in the Courts on special occasions might be reduced to a standard, or an *honorarium*, sufficient to quicken and keep alive the attention, without greatly burdening the suitor, and checking his litigating propensities.

If to each were assigned the duty of watching the acts of legislation in progress, of acting as conservators of the law and its principles, or as protectors of the personages whom they represent, with a right to be heard before a committee of parliament, the field of exertion would be sufficient to employ even so large an army.

The remuneration, as we have indicated, would be derivable from the contributions of the whole of the profession, from the sale of their publications, from the sale of forms, from fees for special cases, from fees for lectures and demonstrations, and examinations, from fees for attendance at the Courts, and reports in aid of the Courts.

We would apply the same principle to the solicitors; to them we would assign the agency of the same matters;—thus for each kind or class, one in Equity, one at Common Law, one in Parliament, and one at home; the counsel being divided into three,—first, second, and junior, or advocate, assistant, and draughtsman.

We do not see that it needs any act of legislation. The first step would be to establish the Publication Society (as suggested in a recent Number of this Journal). After that, let each person who desires to take part in this undertaking select his division of the subject according to his previous pursuits, carefully eschewing any division of the undertaking which may have been occupied by another, and following as far as possible a common method, so that divisions of the subject which are common to others may be easily extracted, and interwoven and consolidated with such other subjects. The various modes of treatment which we indicated in a former article would give ample scope and verge for the efforts of original genius, and demand a range of service that would give full occupation for more labourers than even the profession in its present state would afford the means of meeting.

If two or more should cast their eyes on the same subject, it might be left to the arbitration of the court legal to determine to whom the preference should be given.

To counteract the sluggishness that might be feared from anything approaching to a monopoly, we would set apart a certain sum to be given to those who should detect errors, in the proportion of the results of their labours; and it should be the duty of a certain class of officers to consider and determine the fact whether error or not.

All the works should be indexed after the same manner: and to facilitate index-making, standing indexes should be prepared by each officer as to his subject matter; and as there would be an officer for every subject matter, the index in the result would be an universal one, calculated to give unity to the law itself, and to make the knowledge of it as uniform as it can be, considering how diversely mankind see the same things even when presented at the same point of view, and under the same aspects.

The four great objects: the making a body of law — the promulgation of it — the conservation of it — and the interpretation of it — would be accomplished by this means. The work of consolidating and codifying is too large for one individual, or for a commission; and if made with the most consummate skill, would yet fail of acceptance, because the legislature had not mastered the subject; and even if the legislature should pass it, the profession would set it at nought, or misinterpret it, partly from misapprehension, and somewhat from perversion — the result of a repugnance arising partly from ignorance, partly from annoyance occasioned by their old horn-book being superseded, and partly from the tendency of the British human minds to resist at first any rule set down for them. The promulgation and the correct interpretation would be secured by making the great body of members of the profession take part in its concoction. In short, all the objections and all the difficulties would be obviated by an organisation so comprehensive.

We would assign each part or division to a Committee consisting of a peer, a member of parliament, a privy councillor, a counsel, and solicitor, assisted in the drudgery by a pupil

for the bar and an articled clerk, acting according to one general scheme. No one body or person would have the entire control of any single division, while he would be brought in relation to every part.

The whole body of law divided into so many parts, the mastery of each would not be difficult; and, assisted by persons charged, as above said, with the conservation of the general law, and its principles, and the protection of the different classes of persons affected by it, and by the officials of the various departments, the difficulty would be less.

Much, however, would depend on the organisation of the inferior aids, — the writers, printers, and index makers; upon the settlement of the order and course of proceeding; upon the preparation of the moulds and forms into which the different parts of the law should be thrown; on the mode of intercourse which should be adopted for bringing the functionaries together, — points of no difficulty, and for which there are ample materials, but the neglect of which has occasioned the failure of many recent legislative and official arrangements.

It will be asked, How are all these things — good and useful, no doubt — to be accomplished? We must refer to the suggestions, in our last article, on the state of the profession. It needs and must have a council for the management of its own affairs. All great fraternities should have this advantage, — an advantage as beneficial to the public as to itself. In the meantime we probe and anatomise the evils, though somewhat desultorily, that, when the business is set about, it may not be in a namby pamby, *petit maître* style, which, dealing with mode — the fringe and fashion of the thing — and not with its principle, — wants the means of self-development and self-adjustment which even limited reforms, well-principled, always have, and makes matters worse by encouraging the idea of reform only to disappoint it, and provoke indiscriminate and inapplicable efforts.

ART. VII.—WORKING OF THE INCUMBERED
ESTATES ACT.

1. *Tenth Report from the Select Committee on Poor Laws, Ireland.* Ordered by the House of Commons to be printed, 6th June, 1849.
2. *An Act to facilitate the Sale of Incumbered Estates in Ireland,* 12 & 13 Vict. c. .

THE Incumbered Estates Act¹ has now become the law of the land, and our readers have long been aware of our sentiments respecting it. We have for some time looked forward to a measure of this nature, not only as good in itself, but as leading to much more that will even be better. In Ireland, for various reasons, we have more power to legislate with respect to the present law relating to land than in this country. The necessity for some legislation which will restore this commodity to its real value,—which will transfer it from those who cannot make use of it to those who can,—is now almost universally acknowledged, and the expression of this wish bursts out on every occasion from the legislature. Let us take as an instance of this the following resolution, to which the Select Committee on Irish Poor Law (perhaps the most important committee of the present session) came to on the 19th of June last:—

“That permanently to diminish pauperism in Ireland, and to secure the working of the Poor Law without grievously burdening the industry and property of the country, it is desirable that measures be adopted to remove *all impediments which the law or practice of the Courts imposes on the transfer of lands.*”

Thus it is that now the difficulties attending the practice of the Courts and the transfer of land are found to lie at the roots of many evils, which have hitherto not been supposed to be connected with them. Out of the inquiry which this bill has originated will spring, if we mistake not, an improved system of transfer of land, not only applicable to Ire-

¹ We have treated this as an act, and not as a bill, because the last stage only is wanting to it.

land, but to England also. We gladly avail ourselves of any opportunity of collecting information respecting it, with the view of facilitating its operation; and shall therefore give some extracts from the evidence of some Irish lawyers who were examined by the Irish Poor Law Committee, chiefly with a view to an explanation of the practical effect and operation of this important measure. These witnesses are not only lawyers, practically acquainted with the subject-matter of their evidence, but have also directed their attention to the study of political economy; having all of them, we believe, successively held the chair connected with that science in the University of Dublin, and having as such directed their inquiries to this important branch of it. The Gentlemen to whom we allude are Dr. Longfield, Mr. Lawson, Mr. Hancock, and Mr. Butt, Q. C.,—and we propose to collect their evidence.

. But before doing this let us go a little further back. We are not desirous of entering into the discussion which has been raised as to the propriety of conferring the extensive powers which the act confers on this commission. These powers are admitted to be extraordinary, and are intended to be temporary. The justification for calling them into existence is rested upon the peculiar necessities of the case. They are intended to come to an end when these necessities have been satisfied. We are willing to admit that the case does call for remedies as potent as that which Sir Robert Peel has suggested, and the present Government purpose carrying into execution. Our object is rather, assuming the necessity of the measure to be shown, to call the attention of our readers to the circumstances which have made it necessary. They are indeed most worthy of their serious attention.

Why is it, then, that this extraordinary commission is required to deal with landed estates in Ireland? We live within the United Kingdom in profound peace. The heroes of Widow Cormach's cabbage-garden have left in the hands of the Crown no vast extent of forfeited demesnes which require a new distribution. We are not called upon to divide among a host of claimants enormous funds, like the 20,000,000*l.* of compensation money granted to the West India pro-

prietors. It is, strictly speaking, no new state of things with which we are called to grapple in Ireland. The storm which has burst over that country has been long gathering. An unaccustomed pressure has indeed caused evils, which, long borne with difficulty, have at length become unendurable. But the burden under which the ordinary judicatures of Ireland are now overpowered has been for many years accumulating. The parasitic growth of incumbrances, by which the properties of Irish landowners are overrun to such an extent, and for the clearance from which measures like the Incumbered Estates Bill have become indispensable, has grown up under the favouring atmosphere of our ordinary laws,—laws by which England as well as Ireland is affected; and it is well worth our while for our own sakes to make clear to ourselves how it is that Irish properties have got into their present state—well worth our while to ask how can such a condition of things be prevented from arising either in Ireland or in England in future. It shall be our endeavour to give an answer to these important questions.

First, then, how is it that Irish landed property has got into its present involved condition? by which we mean, not, how is it that the Irish landowner has got into debt, and wants to sell his estates?—with that question we have nothing to do. But how is it that, being desirous of selling their estates, the Irish proprietors are unable to do so, without the aid of an extraordinary commission empowered to give the purchaser a title by act of parliament? The answer is, because there generally exist upon these estates a vast number of claimants, holding general securities under the name of judgments, affecting the whole of this property, and without whose concurrence or satisfaction no part of the property can be safely purchased. The evidence of every body at all acquainted with Ireland, who has given evidence on the subject, points to this evil of judgments as the monster evil under which the proprietors are suffering. Hear the graphic description given by Lord Campbell¹, on the authority of Sir Edward Sugden,

¹ In a speech in the House of Lords on the introduction of the Incumbered Estates Bill, June 12.

of the scene which the administration of an Incumbered Estate in Ireland is wont to produce in the High Court of Chancery:—

“When such a case is called on,” says his Lordship, “every judgment creditor who has a supposed lien on the estate, or his representatives, is entitled to have notice to appear and be a party to the proceedings; and the practice is, that, when the case is called on, each gentleman who has a brief rises and says, ‘I appear for So-and-so,’ and then throws the brief towards the Lord Chancellor; and Sir Edward declared so many briefs were thrown towards him in some causes, that it actually resembled the bombarding of a town.”

But the statement of the evils attendant on this favourite Irish method of obtaining a security for money, is not now heard for the first time. Five years ago, before the potatoe crops had failed, before the famine consequent on that failure, and the pressure of the poor-rates arising from that famine, had revealed to the public ear the extent of Irish incumbrances, and the difficulty of getting rid of them, the same tale was told by well-informed witnesses examined under Lord Devon’s Commission, upon the occupation of land in Ireland.

“I have known,” says Dr. Longfield, “an estate of 12,000*l.* a year eaten up by a number of small judgments.”¹

The reason is apparent from a passage of his previous evidence. He says—

“The effect of a judgment is to be an incumbrance upon all the estate which the debtor has at the time of the judgment, or which afterwards passes through his hands, until the judgment is satisfied. Therefore, when an estate is incumbered by several judgments, an almost insurmountable bar exists to its alienation except by a suit in equity. A man must sell enough at once to pay all his judgments, since each operates as a lien upon the whole of his estate; and the estate remains subject to those incumbrances in the hands of an extravagant person who has no means of improving the condition of the tenantry.”²

¹ Occupation of Land, P. R., 1845. 19. No. 51. Answer 52.

² Ibid. Answers 43. 51. We have somewhat condensed the statements of the witness.

But this state has been produced by a condition of the laws in Ireland, not peculiar to that country, but shared by England; though for some reason, which is not easily intelligible, the Irish have put the law in motion in a way which the English have not. In Ireland, as in England until a recent period, a judgment operated as a lien upon half the lands of the debtor only, and it affected leaseholds only from the time when they were actually taken in execution by the sheriff. The act which has extended the lien of the judgment creditor in Ireland to all the debtor's property, of whatever kind¹, has done only what an act passed two years before² had already done in England. And the act which in Ireland gave to each judgment creditor a lien on the whole, instead of a moiety only of the real property of his debtor³, preceded the English act to the same effect⁴ by the like period only. In one respect only does the Irish judgment debtor possess, under the last-mentioned Irish act, an advantage which the English judgment debtor does not possess; namely, in the power of obtaining from the Irish Court of Chancery, on petition, a receiver of the rents of the debtor's lands, without the previous formality of suing out execution, and of course whether or not he could obtain the delivery of the lands under that execution.⁵

In England, the appointment of the receiver is in aid only of the common law; it is held, therefore, incumbent upon the judgment debtor, even though he was proceeding against a mere equitable estate, to go through the useless form of issuing out execution⁶; the receiver will not be granted unless the legal remedy of taking possession under an execution was impracticable; and the application, where it is tenable, required to be made through the more cumbrous and expensive machinery of a bill.

But this difference in the law, though it has doubtless conduced to the ruin of Irish proprietors by bringing large extents of land under the management of receivers, and sub-

¹ 3 & 4 Vict. c. 105.

² 1 & 2 Vict. c. 110.

³ 5 & 6 W. 4. c. 55.

⁴ 1 & 2 Vict. c. 110.

⁵ 5 & 6 W. 4. c. 55. § 31. c. s.

⁶ *Neale v. Duke of Marlborough*, 3 M. & C. 407.

jecting the owners to the heavy expense of that mode of management, though by the distress which has been thus occasioned, it has, more perhaps than any other circumstance, awakened attention to the grievous condition of many Irish estates, and created a conviction of the necessity of applying some effectual remedy to that condition, is not in itself the cause of that difficulty of disposing of Incumbered Estates in Ireland, upon which we have dwelt. Far from it. In themselves nothing can be more equitable than the provisions of the act under which these receivers are appointed. The creditor applies the most summary and least costly process possible, by a petition. The Court is enabled to limit the receiver's authority to so much only of the lands of his debtor as shall appear to it sufficient for the purpose of paying the sum due; it can require evidence of the particulars or rental of the land over which he is appointed, so as to ascertain this amount. On the application of other creditors it may extend the order made to their demands. It may, on the death of any party interested, continue the proceedings in the name of or against his real or personal representatives, on a simple motion. So far indeed is the facility of obtaining a receiver from being the cause of these difficulties, that the chief remedy for them suggested by the witnesses whose evidence has been adduced, is an enactment that a judgment shall not be a lien upon lands in the hands of a purchaser, *unless* a receiver for the judgment creditor is actually appointed.

We are anxious to make this subject clear, in order that our readers may understand the real bearings of the case. Be it borne in mind, then, that the evils on which we have dilated, though at present most conspicuous in Ireland, may at any time spread to England.

"Paries jam proximus ardet."

It is time that we should arouse ourselves, for our own interest at least, if that of our neighbours is insufficient to move us. Our present laws give us no security against the occurrence on this side the Channel of a state of things similar to that which on the other side has called for such extraordinary remedies. That the estates of our landed pro-

prietors are not involved in a similar inextricable maze of undefined incumbrances, arises, not from the better constitution of our laws, but only from a difference in our mode of acting under them,—a difference which may at any time disappear from causes not foreseen, nay, even from the unexpected operation of measures in themselves beneficial. For instance, could any amendment in the law be more generally acceptable than one which should reduce to an economical and rational simplicity the present expensive and cumbrous mechanism through which alone relief can be obtained from the Court of Chancery. Yet were this done,—were it possible for a judgment debtor in England, as in Ireland, to obtain at a trifling cost that redress in itself so reasonable, the appointment, namely, of a responsible officer of a Court of Justice to take possession of the property and administer it fairly for all parties until the debt is paid, judgments might become in England, as they have long been in Ireland, a favourite security, and then, before ten years had elapsed, the estates of English borrowers would be in danger of becoming as hopelessly involved as those of Irish borrowers are at present. Surely, it is time,—and more especially bearing in mind some recent decisions,—that we should seriously set ourselves to consider how the possibility of such evils may be averted; and this brings us to the evidence on this subject.

I. The Facility of incumbering.

“9262. Will you state whether, in your opinion, any part of the present distress in Ireland is to be attributed to the state of the laws with respect to land?—*Dr. Longfield*: I think it can, so far as the distress has been increased by the incumbered estates of proprietors. The law in Ireland gives greater facilities to gentlemen to incumber their estates than the law in England does. The Registration Act of 6th Anne, cap. 3. is, in a great measure, at the root of the evil; because, according to that Act, all the deeds of incumbrance range in succession according to the date of their registration; owing to which the possession of title-deeds, and the possession of what lawyers call the legal estate, are both circumstances of very little moment. In England I cannot see what security the lender of money upon land can get, unless he possesses the legal estate, or the title-deeds, or both. In Ireland,

a man may have a perfectly good security without either: a man in Ireland may be the tenth incumbrancer upon an estate, and may know that, if the estate is of sufficient value to meet all incumbrances, his incumbrance is perfectly safe. In England, unless a man has, as I mentioned before, the title-deeds in his possession, he cannot know what amount of incumbrances may take priority against him.

“10,298. *Mr. Butt*: I have a very strong opinion, that one of the greatest mischiefs to landed property in Ireland, and which is in a great degree the cause of its present embarrassed state, is, that judgments are common assurances in Ireland. The law in England and in Ireland, with regard to judgments, is exactly the same, with one exception, which may, perhaps, have caused the difference that exists between the two countries; and that is, that in Ireland the judgment is assignable by law; in England it is not assignable at law. By an Irish statute, passed in the reign of Queen Anne, a judgment was made assignable at law; that is, if a party has a judgment against another, by an entry on the records of the Court, he can assign that judgment to any person. By this entry the assignee becomes the legal owner, and there is no other party upon the records of the Court acknowledged as the owner.

“10,309. *Sir L. O'Brien*: What would you say if it were limited to the estates a man had at the time of obtaining judgment?—I think that would be an improvement; but, having thought a good deal upon that subject, I would be strongly of opinion that the best thing that could be done would be to abolish the law altogether making judgments a charge upon landed property.”

The bad effect of the present law of judgments has been already repeatedly pointed out, and it has been shown that every buyer of land is subjected to protracted litigation, occasioning necessarily, though indirectly, a reduction of price for the purpose of giving a few judgment creditors a remote chance of reaching land, upon which they have been unable, or have neglected to obtain a direct charge.¹ So far, then, as it is proposed to relieve lands from this general liability, we heartily assent to the proposition of the witness; but we cannot quite understand his evidence so far as he objects to

¹ See Serjeant Manning's Proposal for the Amendment of the Law of Bankruptcy, p. 57.

an easy mode of incumbering estates which is highly desirable. He thus continues as to this:—

“10,312. People who are engaged in mercantile affairs can borrow in order to carry on their speculations?—As far as my experience in seeing the effects of incumbrances upon the land goes, *I do not think it an advantage that the landed proprietors should have that facility of borrowing money.*

“10,321. *Colonel Dunne.* Will you state your opinion of the effect of the Registry Act of Anne upon landed property?—I think the Registry Act, which was also passed in the reign of Queen Anne, has had a very injurious effect upon landed property in Ireland,—even more than the system of judgments,—*by giving proprietors facility of incumbering their estates*; of course grounding my opinion on this point, as well as the opinion I have already expressed in relation to judgments, upon the circumstance that I conceive the multiplication of incumbrances by landed proprietors to be a very mischievous thing to the country. The Registry Act of Anne does this: any person having an incumbrance upon an estate, and registering it, is sure of two things; first, that he finds upon the register every previous incumbrance created against those lands by any party against whom he searches; and secondly, that no subsequent incumbrancer can displace him, because the Act provides that the incumbrances take precedence according to the register. The effect of that is, that the fourth, fifth, tenth, twelfth, or even the fiftieth incumbrancer, if the estate be of the value, is just as secure as the first. That cannot be the state of things in England. That opinion I ought to express with some hesitation, for I have never been called upon to advise on English titles; but I can speak to the fact, from my knowledge in advising upon Irish titles, that it would be possible for the third, or fourth, or sixth, or fiftieth incumbrancer, with perfect security, to lend his money upon the security of an estate in Ireland. *The number of incumbrancers may, by the operation of the Irish law, be multiplied with safety to any amount; and, in that way, I think the Registry Act has operated most injuriously upon property in Ireland.*

“10,349. With respect to waste lands, the facility of parting with them upon terms advantageous is very much impeded by this wide-spread system of judgments?—Very much so: the great impediment to the facility of transferring land is allowing judgments to be a charge upon all a man's land.”

This last opinion, as we have said, has our concurrence; but as to the number of incumbrances being easily multiplied if the security is of sufficient value, this, so far from being a disadvantage, is an advantage of the register. We wish to obtain a system under which this may be done. Land should represent so much capital, and it should be nearly as easy for the owner to obtain credit on its real value as to draw upon his balance at his bankers. If a good system of registry existed, it would not prevent a ready dealing with the land. It would show in half an hour the real state of the incumbrances on the land; of course, if incumbered beyond its value, that would be a matter which the owner and the incumbrancer must settle; but otherwise, the purchaser would satisfy the incumbrancers, and there would be an end of them.

But we now turn to the next head:—

II. — *The present Difficulty of effecting a Transfer.*

“9268. Is there any other difference than that which you have alluded to between the laws of England and Ireland, which makes it more difficult to transfer property in Ireland than in England? — *Dr. Longfield*: The law in Ireland, which makes a judgment assignable, has that effect also, to a certain extent. A judgment is a very common security for a debt in Ireland; and a judgment affects all the property of which a man is possessed at the time of the judgment, or which he may afterwards become entitled to; so that, if a man sells a small portion of his estate, he cannot give a title to it, unless he discharges all his judgment debts. The practice is, to accompany every mortgage with a bond in double the amount of the mortgage; and a warrant of attorney, confessing judgment, is annexed to that bond. Where you talk of a bond in Ireland, it almost always means a judgment,—a judgment being so much a matter of course.”

“9803. Will you state what are obstacles to the transfer of land in Ireland, which have come under your notice?—*Mr. Lawson*: I think the principal obstacles are, the expense and delay of searches, the difficulty and uncertainty of title, and the number and complication of incumbrance.

“9804. With regard to searches, is it not a fact that in making out a title it is necessary to search for a very long period, say fifty or sixty years, so that the purchaser may be certain that there is no incumbrance nor any past settlement that may endanger

his title?—Yes; the rule is this: the abstract must commence sixty years back; the purchaser then will require searches against every party who, during those sixty years, appears on the abstract to have had an estate in the lands; searches must be had in the registry against that party during the whole period in which he had any estate or interest which could enable him to affect the lands.

“9812. Generally, with regard to the effects of this heavy cost of transfer, you would say that it acts injuriously upon the proprietary class, and upon the industrious class in Ireland?—It acts very injuriously both on those who have to sell, and on the public, who are always interested that there should be as free a circulation of land as possible.

“9979. Can you give any instance to show the delay and cost ordinarily incurred by parties borrowing or selling by private contract?—*Mr. Hancock*: Yes; I took the trouble of making some inquiry, because I think that many of these matters are not understood; parties have not definite ideas upon them; persons hear that there is a great deal of delay, but they do not understand what it means. Now, I obtained some instances from parties, on whose information I can rely. I may state that there is an important distinction in collecting information of that kind to be observed between the period since Sir Edward Sugden's Act of 1844, and the period before that act, because since that act there has been a very great diminution, or at least some diminution in the delay and cost on sales of land, in consequence of improvements introduced by that act. I may mention that I have cases since the act: one of nine months and fifteen days; one of fifteen days; one of four months and twenty-five days; one of six months and twenty-eight days; and one of three months.

“9980. Are those cases in which there was any dispute or any point raising litigation?—There was no litigation; those are cases of private sales and private loans, without any litigation at all. The cost in those cases to one party, was 16 per cent., to another 26 per cent.; to one 15 per cent., to another 15 per cent.; in another case 13½ per cent.; and those were where the sums were small, 850*L.*, 150*L.*, 500*L.*, and 500*L.*; where the sums are large, such as 5,400*L.*, the cost comes down to about 1½ per cent. Thus, taking the number of years' purchase, supposing the property sold for twenty years' purchase, there would be a difference in one case of three years' purchase by the costs of one party alone; and if the costs of the other party were the same, it would make a

difference of six years' purchase; in another case, the costs to one party would be five years' purchase; and if it were anything like the same to the other party, it would make ten years' difference in the selling value of the property; in another case, the difference would be three years, in another also three years, and in another $2\frac{1}{2}$ years."

Closely connected with the difficulty as to titles and length of deeds in the transfer of land is the delay and cost of Chancery Procedure. This branches into another subject,—the reform of the Court of Chancery, because these evils affect not only suits relating to land, but most other suits. Still we shall see how frightfully the present practice of this Court affects the value of land:—

" 9290. Do the forms of procedure in equity suits unnecessarily increase the expense of sales under the Courts? — *Dr. Longfield*: To a fearful extent. We will suppose the case of a mortgage, the existence of which and the sum due upon which is not a matter of doubt at all; but the party has to file a bill, and he has to make frequently as many as fifty or sixty parties defendants (I have known a greater number than that), and every one of those must be served with a subpoena. This causes delay; and there are frequently abatements from some one of the parties dying in the progress of the suit; and in case of the death of any of the defendants, the bill has to be filed against the representative of that deceased party; then all the parties put in an answer; or, if they do not put in an answer, motions are made to take the bill as confessed against them. The evidence in the cause is perhaps merely to prove a deed which no one doubts; the cause is set down to be heard; and then the whole Court appears alive with persons engaged in that cause; each counsellor has merely to open the answer, and state for whom he appears. The same thing is gone through, as I have stated before, with regard to partition suits. The hearing of this cause, costing frequently 400*l.*, does not occupy one minute; and the decree is a matter of form.

" 9291. With regard to properties of a small amount, such proceedings as these must be entirely destructive of the property? — Quite so: but the expense is not so great where the property is of a small amount, because it is not likely that there will be so many defendants. Every defendant is a person having an incumbrance upon the property, or having an interest by family settlements or otherwise in the property; but then the cause is not a quarter

over. When this decree is pronounced, there is a reference to the Master to take an account, and advertisements are published, and every party who has an incumbrance comes into the Master's office and files a charge, stating the nature of his incumbrance, and the amount which he claims to be due to him. There is then a discharge filed to each of those charges; the Master in the office then adjudicates upon each of those discharges and charges, and finally makes a report declaring what are the incumbrances on the estate. Supposing the case to be a clear case (for I am taking a case *in which there is no ground for litigation whatever*), the cause is then set down for hearing on report and merits; and all those parties again appear before the Lord Chancellor, by their counsel, at an expense, frequently, of 300*l.* or 400*l.* more; a second hearing of the cause takes place, which occupies about one minute more, and then a decree is pronounced, that being a formal decree for the sale of the property, if the debts found due by the report are not paid; a certain time for the payment of the debts elapses, and then, the debts not being paid, the solicitor for the plaintiff commences to make out title, in order to sell the property; and then the real work begins, because the decree can be easily anticipated beforehand, *though it takes four or five years perhaps to obtain a final decree.*"

This is sufficiently familiar to all our readers who may be either practitioners or clients of the Court of Chancery, but the statement cannot be too often repeated until this state of things is amended. We shall therefore give another of these Chancery confessions from another witness, Mr. Butt:—

"Any person who is an incumbrancer on an estate of such a nature as confers a title to sell the estate, which now almost every incumbrance in Ireland does, can file a bill in the Court of Chancery to sell that estate. To do that, he must bring before the Court, in one way or other, every party having an interest in the estates no matter how numerous the parties are. He must state in his bill all the facts connected with the estate, and his own claim upon it; and the bill generally states the claims of every other party on the estate. Each of these parties is then called on to answer the bill. This being done, all parties proceed to prove the case they have alleged, by examining witnesses on written depositions; and this being done, the cause is set down to be heard. Throughout this proceeding, the rules of the Court are just the same as for a suit determining the most litigated rights.

The rules of pleading are the same ; the time allowed to answer, and for making proofs, the same. The number of parties makes the process very expensive ; yet when the cause comes to be heard, *it does not occupy five minutes in court* ; and the Chancellor makes a decree, directing one of the Masters to take an account of all incumbrances affecting the estate. This is called a decree to account — it is a mere matter of form, and yet to obtain it, all the forms, and almost all the expense of an adverse litigation, with a great number of parties, must be gone through. The Master then proceeds to act on this decree. All parties to the cause must, before him, establish their claims. In addition to this he inserts advertisements in the newspapers, calling on all persons having charges on the estate to come in before him. Any person claiming any incumbrance gives to the Master's clerk a written statement of his claim : this is called a charge ; any other party wishing to dispute this, puts in a counter-statement, called a discharge. Upon this the Master proceeds to adjudicate, and, if necessary, he hears evidence. Having heard and decided on all the claims, he makes his report, stating the nature of the property, all the incumbrances upon it proved before him, the amount due upon each, and their priority as charges on the estate. These proceedings are binding upon all who were originally made parties, and upon all creditors who appear before the Master, but upon no one else. If all parties interested are brought before the Court, which it is the duty of the person applying for the sale to see, this report exhibits a complete statement of all incumbrances, and is a complete adjudication upon the rights of all parties. When the report is made, the cause is again heard by the Chancellor, and an order is made for the sale of the estate : this is called a final decree. If any party is dissatisfied with the Master's report, he can, at this hearing, appeal to the Chancellor, by filing what are called exceptions to the report. If this be done, the Chancellor first decides the questions raised by the exceptions, and then, having completely adjudicated on the rights of all parties before him, he makes an order for the sale of the estate. Up to that the process is very needlessly expensive, and I am quite sure there is generally a wasteful, and, I am sorry to say, in some few instances, a profligate expenditure in that process. But that decree being pronounced, binds the parties who have been brought before the Court ; and supposing all parties having an interest in the estate to have been brought before the Court, they are bound by the decree, and a complete title is made. The estate is then set up to be sold. The party having a

legal estate is bound to execute a conveyance to the purchaser; and no person who is a party to the decree can ever disturb the title of the purchaser. The decree of the Court of Chancery has no effect in itself in conveying the estate, it only acts by coercing any party who has the legal estate to convey it; but as to persons having a mere equitable interest, the decree itself completely binds their interest; they need not be parties to the conveyance, but in practice they are very often made parties."

While on this point we may add a groan from this side of the water. We extract it from the evidence of Mr. Spence before the Select Committee (1849) of the House of Lords on Bankruptcy:—

"I have been furnished, within the last few weeks, with the particulars of a case, now in the office of one of the Masters, against whom not a whisper has ever been heard, which strongly shows that no efforts can prevent those who have an interest in delay from succeeding in their object in the Masters' offices. In the cause of *Stathschmidt v. Lett*, in Chancery, one of the parties, a residuary legatee, was appointed receiver of an estate yielding about 10,000*l.* a-year. He fell into arrears with his accounts, and was removed by the Court. In March, 1846, there were seven years of account to pass (it is nominally the duty of a receiver to pass them annually); in February, 1849, two only had been finally passed. The solicitor from whom I derived this information, Mr. Mordaunt, (it is with his express authority that I mention his name, but which, for obvious reasons, I do not often obtain from those who furnish me with similar information), states that before a Commissioner of Bankrupts all the accounts would probably have been passed in as many weeks as it has taken years in the Masters' offices. As Mr. Mordaunt informs me, every solicitor and party, excepting the defaulting receiver, has anxiously pressed for dispatch. Mr. Mordaunt's client is an annuitant of 400*l.* a-year, and she has been obliged to go abroad to avoid her creditors in respect of debts contracted for her subsistence, about 2000*l.* for arrears of her annuity being due to her (the same amount being due to other annuitants), of which she cannot obtain one farthing, owing to the delays in the Masters' offices. This is by no means a solitary instance."

Let us now turn to another head of grievance as it exists in Ireland:—

"10,328. *Sir J. Graham*: As relates to the employment of

labour and the improvement of land in Ireland, is there not a marked distinction between the estates managed by receivers and estates managed by the owners? — *Mr. Butt*: Of course there must be a great difference; my own knowledge does not extend to that. I do not pretend to have any knowledge of the state of the country, except such as a person occasionally travelling through it may have; but I can conceive no system more ruinous to landed property than the system of receivers. In the first place, the poundage is no more than the poundage that parties would allow to an agent; it is 1s. in the pound; but every step that a receiver takes must be by a motion in court, or a statement of facts to the Master. Almost every step the receiver takes, he submits a statement of facts to the Master. If a tenant applies for an abatement of rent, it is almost impossible for that abatement to be obtained; the Court do not consider that they have jurisdiction to abate the rent without the consent of the parties. It is difficult to explain these things to the Committee without going at more length into the practice of the Court than is convenient. When the Court of Chancery take possession of an estate, they do not disturb any existing lettings; where a tenant who is previously in possession applies for an abatement of rent, the Court think that they have no jurisdiction without the consent of the owners of the estate; in a case, however, where the letting has been made under the Court, the power is exercised. In either instance, however, there must be a motion in Court, and a reference to the Master, and not unfrequently an expense of even 20*l.* or 30*l.* incurred by some parties. The same thing frequently occurs when the tenant claims any allowance against his rent, grounded on any contract with his landlord; this the Court will enforce; but, generally speaking, there must be a motion in Court, and a reference to the Master; but in a case where the Court itself let the land for seven years pending the suit, they consider that they have jurisdiction to abate the rent. The parties attend by counsel sometimes, and always by attorney, at a very heavy cost. All this appears to me to proceed upon what I would almost call the absurd notion of managing an estate by a judicial proceeding. The two things are as inconsistent as can be conceived; and yet as long as the system of receivers under the Court is continued, it is the inevitable result that every case of an abatement of rent, or distraint upon the tenant, if disputed, must be adjudicated on by the Court, and must entail most enormous costs."

The attention of the profession was called to this state of

things as it exists in this country, in the Report of the Equity Committee of the Law Amendment Society on the Management of Property in Chancery¹, and we are glad to see that the whole subject, so far as it affects Ireland, is being investigated by a Select Committee of the House of Commons in the present session. Why should the inquiry not be extended to England? Several important subjects connected with the main inquiry turned up incidentally, such as tenant right; which, let our readers be assured, must soon be applied to by specific legislation, and which is of great importance in connection with the present act. Speaking of Mr. Pusey's Bill, the witness is asked, —

"9330. It gives a permissive power to enter into arrangements; do you think that that would be sufficient? — *Dr. Longfield*: Certainly; nothing else would prevent fraud; but I think a permissive power would be sufficient, so that the landlord might come to the tenant, and say, 'If you will build on the land, or otherwise improve it, you shall have such and such compensation at the time of your leaving the land, or else you shall have a renewal.'

"9331. And likewise the tenant might say to the landlord, 'I will build a house if you will give me such and such security?' — Yes; I would leave the parties open to make the contract or not, otherwise I am afraid you would have the landlords and tenants going to law about the improvements.

"9332. *Mr. Napier*: Would you limit the amount that might be expended to any number of years' rent, or in any other way, with a view to protect the interests of the reversioner? — No; I should not be inclined to do so; because, if the contract is a fair one, and based on certain rules, I think the interest of the reversioner will be promoted by it."

Mr. Hancock says: —

"9961. If you take the different parties whom you may expect to make improvements, tenants for life are very much blamed for not adopting improved systems of agriculture; but the majority of tenants for life in Ireland have no power of charging the inheritance for improvements; consequently, whatever sum a tenant for life would lay out in improvements, in the present state of the law, would go to his eldest son, and not as a provision for his younger children, or even as a provision for the payment of his own subsequent debts. The majority of the tenants in Ireland are

¹ Printed 8 L. R., p. 87.

yearly tenants, and are therefore in such a position that they have no legal security for adopting any improved system of agriculture, with a certainty of reaping the full profit of the improvement."

"10,063. There are some points with regard to the effecting of improvements in Ireland, which are important: with regard to the ownership of improvements upon land,—what falls to the tenant and what to the landlord? do you consider that important? —I think that the feudal principle which prevails with regard to the ownership of improvements is very injurious; that it operates injuriously in several cases. First, it deters a party from buying, without a very strict investigation of title, any land that happens to be of small value; because if he should be ousted by title paramount, according to law all the improvements would be confiscated in such a case. In the same way it renders it dangerous to lay out money on leaseholds; because the expense of investigating title is very great, and parties are deterred from laying out money on leaseholds where there is a risk of being ultimately deprived of the property. The third case is, that wherever any doubt occurs as to the title to land, or wherever it becomes the subject of litigation, the land is immediately, by this principle, doomed to barrenness; because no man, whether in possession or not, is safe in carrying on any improvement upon it, inasmuch as the person who ultimately recovers, recovers not only the land, but every penny that has been laid out in improvement in the meantime.

"10,064. Could you suggest any improvement in this respect which would not be unjust to the proprietor of the land?—Yes; I would suggest, in this case, that any party, whether purchaser or tenant, on being ousted by title paramount, might present a petition, in a summary way, to the Court of Chancery, to claim compensation for improvements *bonâ fide* made; and that on proving that he was a *bonâ fide* purchaser or tenant, and that the improvements had been *bonâ fide* made, the Chancellor, if the sum claimed were above 50*l.*, might direct that he should be paid the sum expended, provided it did not exceed the value of the increased annual income produced. If the sum were less than 50*l.*, I would give a similar jurisdiction to the Court of Quarter Sessions.

"10,067. *Mr. Bright*: The question of tenant-right has excited some interest in Ireland: what is your opinion with regard to the power of Parliament to make any judicious change in that respect? —I think the only judicious change that Parliament could make in that respect would be to enable tenants for life, or other parties having limited interests, to make any contract for the *bonâ fide*

purpose of securing a tenant compensation for permanent improvements that was not a fraud on the remainder-man.

"10,068. *Sir J. Graham*: Have you seen Mr. Pusey's bill, which is now extended to Ireland, in progress through Parliament?—Yes; that bill has a very valuable provision in it, in amending the law of agricultural fixtures. With regard to tenant-right agreements under it, I think it is a step in the right direction; but I think that the power of making the agreements is too limited. I think it is a power that may be very safely trusted to tenants for life, to a very great extent. I think there need not be the restrictions which are put upon the power as given in that bill. I think it is a step in the right direction.

"10,069. There is no limit with respect to value?—No; but it is confined to particular sorts of improvement, and the period of repayment must not exceed a certain time; and there are other restrictions.

"10,070. There is no limit as to amount?—No limit as to amount; but there is a limit as to the kinds of improvement, and the period in which the money is to be repaid; and there are other restrictions of that sort which, I think, afford very little protection, and only fetter the operation of the bill.

"10,071. But it will be an improvement upon the law of landlord and tenant in Ireland?—It will.

"10,072. *Mr. Bright*: Is it your opinion that such a law should be permissive and enabling only, and not compulsory?—Certainly; I entirely disapprove of any compulsory law on the subject."

It is not our intention on the present occasion to enter into that portion of the evidence of these gentlemen which relates to the Law of England as to Primogeniture, but we may glance at the effect which they attribute to the present Law of Settlement. Although this is by no means peculiar to the law of Ireland, yet we apprehend that in that country charges under settlements remain undischarged frequently for a longer period than in this country:—

"9342. Can you describe, briefly, the mode in which this practice of family settlements interferes with the freedom of land and its transfer?—*Dr. Longfield*: A common settlement is in this form:—To the husband for life; and then terms are created to secure a jointure to the wife; and then charges for younger children; and then to the first son of the marriage in tail; and, until

the first son comes to the age of twenty one years, the land cannot by possibility be sold; and even when he comes of age it is subject to incumbrances for the younger children; and sometimes a second settlement is made when the son comes of age, and there is a new set of incumbrances for younger children: I have known three generations of incumbrances on one estate.

“9343. What is the practical effect of such a state of things with regard to that property?—The practical effect is, that very frequently a country gentleman finds himself quite disabled from managing the property, where a great portion of the income of his property goes to other people who have no interest in the good management of the property; and he is a poor man, and is not able to act with the liberality with which he would otherwise be disposed to act.

“9344. And is he injured by being placed in a position which he is not able to maintain?—Yes; he has the rank and territorial influence attached to the estate, though he has not the income from it. In improving times he has an advantage, because he gets the benefit of any rise; but when a reverse takes place, he is unable to overcome it, because he bears the whole weight of the reverse, none of which falls on the incumbrancers.

“9345. What is the tendency of this state of things on the estate itself?—Certainly the tendency of the estate is to grow worse and worse. The tenants are dealing with a man who cannot afford to make those allowances to them which he would otherwise make to them, and they fall into arrear with the rent, and omit to make any improvements: always where the owner is distressed, the tenants are apt to be distressed also.”

We have now, then, enabled our readers to understand some of the defects connected with the tenure and occupation of land in Ireland. Let us now turn to some of the remedies which are proposed, and it is highly gratifying to us to find that they are chiefly those which are familiar to the reader of these pages. Indeed in no part of the United Kingdom have the recent opinions as to conveyancing reform made more rapid progress than in Dublin and among the highly enlightened bar of that metropolis:—

“9283. Have you any other suggestion to make as to the improvement in the law respecting the transfer of property? What would be the precise condition in which you would say the law should be?—*Dr. Longfield*: I would have judgments placed in

the same position as they were in formerly ; that the judgment creditor should have the right of execution against all the property which the debtor had when he took out execution against him, but he should not have the right to disturb the possession of any purchaser of real or personal property from his debtor ; and the judgment then would cease to be an incumbrance.

“ 9285. Have you any suggestion to make as to changes in the law by which the evils arising from the facility of incumbering land in Ireland should be remedied ? — I should reduce every mode of incumbering land to one mode of charging it, and I would not permit more than one charge to be on the same denomination of land, and I would not permit any trusts of that charge to affect the owner of the land. Let the trusts of the charge be a matter between the trustees and the cestuique trust, precisely like what happens with regard to the funds now, where the Bank takes no notice of trusts, but will do with the funds whatever the trustees desire.

“ 9286. Then, in point of fact, you would assimilate in that particular real property to the custom now observed with regard to personal property ? — Yes, to the law as regards funded property ; it is not mere custom, but it is the law.”

Mr. Hancock says as to the Statute of Limitations, —

“ I think that the present period of limitation with respect to land is too long. At present a party may assert his right at any time within twenty years ; and if he has been abroad before his right accrued, he has another period of ten years. I think those periods were established when the world was in a very different state from what it is at present ; when the means of intercourse between remote parts of the world were very slow and very difficult, which is not the case at present, when we have rapid access to every part of the world, and when intelligence is so quickly communicated. That period might, with much benefit, be very considerably shortened ; and certainly, if a party chooses to sleep on his rights for a period of ten years, I think he cannot complain if those rights should be taken from him by the law.”

As to proposed remedies, Mr. Butt says, —

“ 10,255. One always feels very great diffidence in suggesting an alteration of established forms of proceeding. But I think there are precedents for what I am about to suggest. I have said that I think the difficulty in selling an estate by the Court of Chancery is this, that the Court of Chancery must, in every in-

stance, treat the parties coming before it entirely as having an adverse interest. If there is an estate with 100 incumbrances upon it, about which there is not a tittle of conflict, the person who wishes to sell the estate, and who files a bill stating his title, is treated in precisely the same way as he would be if he were raising a litigated question. Each of the incumbrancers comes in in the same way to answer the bill. The case is set down to be heard, as I explained before; and though every human being knows that it is a perfect matter of course, yet the tedious and expensive process, of which I before spoke, must be gone through. Formerly, when I practised more in that kind of business than I do now, I had frequently a large brief, upon which I had a large fee, and when the cause came on for hearing, I simply got up and said, 'This is a foreclosure suit; we have made the usual proofs, and we will, with the permission of the Court, take a decree to account.' The Lord Chancellor has said, 'Be it so,' and all the counsel have put up their briefs, every body knowing beforehand that that must be the result; still, considerable expense had been incurred, because the suit had been constituted exactly as if adverse questions had been involved.

" 10,256. Could that process be shortened? — Yes, I think it could. When Sir Edward Sugden was in Ireland, it was found that the multitude of judgment creditors that were brought before the Court in that way, each of whom answered the bill, and appeared at the hearing of the case, in fact, made it impossible, from the enormous expense, to sell some estates; and, under the authority of an act, he made an order, by which merely formal parties were not made answering parties to the suit, but were merely served with a short notice, giving them an intimation that property in which they had an interest was the subject of a suit, and stating what the object of the suit was. They were not called upon to appear at the hearing, nor had they any thing to do with it; and if any of them appeared at the hearing, they were not entitled to costs. That has had a most beneficial effect; it has diminished the expense of Chancery suits by much more than one half.

" 10,256*. Would you extend that provision? — I would. I cannot see why, in the case of a decree to account, which is merely a formal thing, it should not be permitted that a person having an incumbrance upon an estate, should present a very short petition to the Chancellor, stating that he had an incumbrance upon such an estate, that he wished to sell it, and that such and such persons were interested in the estate; and that he should simply serve a

notice upon each of these persons, calling upon them to come in and show cause. If, upon that notice, any person came in and disputed the right of the applicant to sell, the matter might then be put in a more formal and full shape for the decision of the Court. If not, there could be no objection to the Chancellor at once pronouncing a decree to account. Perhaps, even upon such a proceeding, the Chancellor might have the power of making a decree for a sale in the first instance. There certainly could be no danger in giving the Court the power on such a proceeding to pronounce a decree to account. All the useless expense and delay to which I have already adverted in the preliminary formalities would thus be saved, without in the least degree endangering the rights of any one.

“ 10,257. *Mr. Bright*: When you say that an estate might have a hundred incumbrances upon it, have you known cases where so many incumbrances as 100 have been upon one estate? — I have; and more than 100. I have known one instance in which, upon a common ordinary bill, such as I speak of, for the sale of an estate, there were 150 answering defendants, even under the new rules.

“ 10,265. The incumbrances would vary from 1,000*l.* or 1,500*l.* down to what sum? — To 20*l.* The largest estate in Ireland that is now the subject of a Chancery suit for a sale, is the unsettled estate of the Earl of Kingston. I have been engaged in some branches of the case, and there are single incumbrances there to the extent of 150,000*l.* and 100,000*l.*; but I believe the bill for selling the estates was filed by a judgment creditor for not 200*l.*”

We are glad to see a general opinion expressed in favour of a registration connected with a territorial map: —

“ 9272. You are aware, I presume, that there has been an ordnance survey over Ireland? — Yes.

“ 9273. Has it occurred to you whether that could be made the basis of an improved system of registration, not of deeds only, but of land? — Yes, I think it could, by having a map deposited there, and altered from time to time, and every registration made by reference to the map.”

“ 9686. You stated that you approved of the ordnance survey being the basis of a registration of deeds and of land? — Yes.

“ 9687. What do you mean by deeds and lands from the ordnance survey? — I mean this: that the description given in the ordnance survey should be referred to in the registration; so that

by having the ordnance survey before me I should know exactly what name of land to search for.

" 9688. If that land changed hands, as it will do, you must change this registration at each change of property, or division of property? — Certainly; and there would be no more difficulty than in sometimes enlarging the map, and depositing it in the Registry Office."

Next as to length of deeds: —

" 10,061. Have you any suggestion to offer to the Committee with regard to the length of conveyances; whether they could not be shortened and made more simple? — Yes; I believe there is only one method that I am aware of by which they could be shortened, and I think they could be shortened by that method; that is, by including the usual powers, covenants, and clauses that are in deeds in an act of parliament, and then enacting that any deed referring to those ordinary covenants, and clauses, and powers, shall have the same effect as if the clause or power referred to were set out in full."

But the grand remedy is the act itself, which all these gentlemen strenuously support, except Mr. Butt, and on his evidence as to this we shall have a few words to say. But first it is proper that we should give a brief statement of the provisions of this important measure.

The act provides for the appointment of three Commissioners (§ 1.), two of whom will form a quorum (§ 2.), and who, for purposes of inquiry, may delegate their authority to one (§ 15.). The principal Commissioner is to have a salary of 3000*l.* a year, and the others of 2000*l.* a year each (§ 3.); they are to hold office for five years (§ 5.). These Commissioners have power to frame forms of application and directions for the proceedings before them (§ 9.), and to make (subject to the approbation of the Privy Council) general rules, *inter alia*, for the course of procedure under the act for securing the prompt and due distribution of the monies received on sales under its powers among the persons entitled, and for the protection of any who are under disabilities (§ 10.). They are empowered to require the attendance of witnesses and the production of all documents relating to any matter before them, and to compel the giving evidence on oath (§§ 12. and 53.). They may appoint persons to take affidavits and examine witnesses in Ireland or elsewhere (§ 13.). Their orders may be enforced in England in the same manner as orders of the Irish

Court of Chancery (§ 14.). They are to form a Court of Record, and are to have all the powers of the Court of Chancery for investigating title, ascertaining and declaring the amount and priority of incumbrances and charges, and the rights of all persons in any property sold under their orders, or the money to arise from the sale (§§ 15. and 33.); for dealing with any contract relating to the sale; and may send cases for the opinion of a court of law, or direct issues of fact to be tried by a jury (§ 15.). They may appoint trustees (§ 32.), guardians, or next friends (§ 38.), for the purposes of the act. They may make order for a partition or exchange, either for the purpose of effecting sales (§§ 43. and 44.) or generally (§§ 45. and 46.); and they have also a general power of assigning intermixed lands to the distinct owners (§ 47.).¹ For the purpose of a sale, they have also a power of apportioning a rent between the land sold and other lands (§ 37.); and of shifting incumbrances (§ 34.); and they may put the purchaser in possession of the land sold and the counterparts of the leases affecting it (§ 29.). They have absolute power over the costs of all proceedings before them (§ 40.). These proceedings are not liable to abate in consequence of any death or transmission of interest, but may be suspended, discontinued, or carried on by order of the Commissioners (§ 39.). They cannot be restrained by injunction. The Commissioners are not liable to be sued for any act done *bonâ fide* (§ 50.). They may review their own orders; but there is no appeal from them, except by their permission, and then only within one month after the order appealed from is made (§ 51.). The appeal lies to a Judicial Committee of the Privy Council in Ireland (§§ 51, 52.). Neither the pendency of a suit for the purpose of obtaining a sale, nor the existence of a decree for sale is to be any bar to proceedings before the Commissioners for the same purpose, though they are to have regard to any declarations of rights made by such a decree; but if "matters come to their knowledge which make them think that the Court should have an opportunity of reconsidering any such decree, or any finding, they may direct application to be made to it." (§ 41.)

On the other hand, no proceeding for sale or foreclosure is to be commenced or prosecuted after an application has been made to them, without their consent; and all proceedings in the Courts of Equity, under a decree for a sale, are to be stayed on a notification of an order for sale being made by them. (§ 42.)

¹ These general powers were given them by an amendment introduced in the Lords.

These extensive powers may be called into action at any time within three years after the passing of the act, on an application by any person entitled legally or equitably, beneficially, or as a trustee only, to any estate in land, or any incumbrance upon any such estate, with one or two exceptions, where the estate is only for short terms of years. (§§ 15, 16. 20. 38. ; and see definition of "owner" and "incumbrancer," § 54.)

On application being made to the Commissioners, if they entertain it they are to direct notices to be given to such persons, and in such manner as they think fit, to hear any persons interested who apply to be heard, personally, or by their counsel, or agents, and to examine the title, incumbrances, and circumstances of the property, for the purpose of determining whether a sale would be expedient, and may thereupon order a sale of the whole or any part of it (§ 21.), unless the owner satisfies them that the amount of the interest or other annual payments due out of the income of the property is less than half of the gross yearly income arising from it (§ 22.); and if different applications are made to them respecting several interests in the same property, or respecting properties so intermixed that it is convenient to deal with them together, they may sell the separate interests or properties together. (§ 36.)

All sales made under the commission are to be made in such manner as the Commissioners direct. The conveyance will not require execution by any one but two of the Commissioners (§ 24.). It is to be made subject to all *bonâ fide* leases by occupying tenants (§ 23.), who are willing to attorn to the purchaser (§ 29.), except such as may be voluntarily surrendered; and the Commissioners are empowered to inquire into the claims of such persons before making it; and it may be made subject to any annual charge, or any incumbrance of which the incumbrancer cannot be required to accept payment before the end of some unexpired term of years (§ 23.); all the claims to which it is so subject are to be stated in it. (§ 24.). It is to be effectual to pass the fee simple of the property sold, unless that property be only a leasehold interest; and then the whole remaining estate created by such lease, "free from every other estate, right, title, charge, or incumbrance" whatsoever affecting it (§ 27.), except rights of common, rights of way, or other easement, rent-charges in lieu of tithes, and crown or quit rents charged thereon, under certain recent drainage acts; and which the Commissioners do not think fit to redeem (§ 28.), as they are at liberty to do. (§ 34.). An order made by the Commissioners for partitions or exchanges is to

have the effect of a conveyance (§§ 43, 44.); and no conveyance or order for partition or exchange made by them is to be impeached for any informality therein. (§ 49.)

The purchase-money for any property sold by the Commissioners, or if the purchaser is himself an incumbrancer, the balance, after discharge of his incumbrance, is to be paid into the Bank of Ireland, to the account of the Commissioners, whose certificate of payment will discharge the purchaser from all further responsibility (§§ 25, 26.). It is to be applied by the Commissioners in payment of the incumbrances upon the property, in the order of their priority (§ 30.); under which must be included the redemption of annual charges (§ 34.); and the surplus is either to be paid to the owner, if absolutely entitled or invested in land, or in the funds, upon such trusts as may affect it (§§ 30, 31.); or paid into the Court of Chancery or Exchequer, to be dealt with as if it had been transferred under the act of last session, "for better securing Trust Funds, and for the Relief of Trustees." (§ 35.)

Lastly. Payment by the Commissioners is to be no bar to the right of an incumbrancer, not paid in full, against the debtor, for the balance, nor to any right of indemnity. (§ 33.)

Having thus stated the provisions of the measure, let us again refer to the opinions expressed as to its policy and the mode of working it.

Dr. Longfield is asked—

"9697. Do you think that it is advisable at this moment to force a large number of estates into a market already full?—I think that a purchaser under the Incumbered Estates Bill would pay more for the estate than if it were in Chancery; and that that circumstance, combined with the saving of costs, would be a serious benefit either to the incumbrancer or to the owner of the estate. In short, if I were the owner of an estate so circumstanced, I would rather have it taken from me by this Court than brought into Chancery."

And in a previous portion of his evidence he places this act on its proper footing.

"9361. Looking to the present condition of land in the south-west of Ireland, to which public attention of late has been much directed, where property is held by the tenant for life, and where this difficulty arises, what remedy could you propose, that could take any effect before the succeeding tenant comes into possession?"

— The present bill enables the incumbrancers to sell a sufficient portion of property ; it could be done without the present bill by the tedious process of a Chancery suit, but the present bill enables parties to do it in a simpler and cheaper form.

“ 9390. Is it not the case in Ireland that land may be considered, more peculiarly than in this country, the great raw material for almost all the industry that exists?— Yes ; there is very little manufacturing industry in Ireland.

“ 9391. Does it appear to you that whatever accumulation of capital hereafter may go on in Ireland must have its foundation in a better employment of the people on the land, and a better cultivation and increased production ? — Yes, I think so.

“ 9392. You have population sufficient, I presume ? — Ample.

“ 9393. Under the present cultivation, is it in some parts excessive? — In a few parts it is excessive under the present cultivation ; there are some parts in which, I believe, the crops of last year were not sufficient to feed the people.

“ 9394. Does it appear to you probable that maintaining the present laws with regard to intestate estates, and with regard to the gathering complexities of settlements by will and on occasion of marriage, Irish industry can be speedily and permanently restored ? — I think it can. I think a law that impedes prosperity does not necessarily entirely prevent it. I should not abandon all hope of the prosperity of the country merely because my views on certain subjects were not carried into effect. I think the removal of incumbrances is essential ; the other alterations in the law I think would be useful.

“ 9395. Is not Ireland in a less favourable position on these subjects because there is so small a manufacturing industry in the country, compared with its whole population ? — Yes ; certainly.

“ 9396. And therefore Ireland is less able to surmount or to counteract any ill effects arising from interferences with the freedom of land than England is ? — Yes ; certainly. Though the land is very important, it is not so very important a portion of the English wealth as it is of the Irish, where it comprises the whole of the wealth of the country.

“ 9243. Have you thought that, in the present circumstances of Ireland, sales in small quantities, within the reach of moderate capital, would be productive of good ? — Certainly ; I think so.

“ 10,247. Will not the purchasers of land prefer a parliamentary title, and the summary process given by the bill ? — *Mr. Butt* : I should say they will ; but I think the value of the parliamentary

title is by a great many persons very much exaggerated. I should be disposed to say that purchasers would be very little more attracted to a sale that had a parliamentary title than to a sale which was conducted either under a decree of the Court of Chancery or by private contract.

" 10,248. Do you think titles to property in Ireland are more difficult or more complicated or less safe than those in England at this moment? — Certainly not less safe, but they are much more complicated.

" 10,268. Do not you think that there might be an amendment in regard to these cases, and that such an amendment would be of greater advantage to the country than a sweeping change in the law of Chancery, by a temporary bill, such as the present? — I have already stated that the novelties in this bill are — first, the changing the tribunal; and secondly, the giving a parliamentary title. It would appear to me that every earthly advantage that can be obtained by changing the tribunal might be obtained (but I give this opinion with very considerable diffidence) by an alteration of the process of the Court of Chancery in these cases. — [But how is this to be done?]

" 10,273. *Sir L. O'Brien*: The object of the legislature ought to be, if possible, to restore confidence in the country, so as to raise the value of property? — I should say that in the present state of landed property in Ireland no contrivance that can be adopted for selling estates will find purchasers for them.

" 10,274. *Colonel Dunne*: Do you think that there will be an advantage by giving a parliamentary title over the title given by the Court of Chancery at this moment? — If the question means an advantage in inducing purchasers to come forward, I should consider it very slight indeed.

" 10,275. *Sir L. O'Brien*: It will not add any number of years to the purchase-money? — If at all, very little.

" 10,289. Do not you think that there would be found a large number of purchasers in Ireland, who had capital enough to purchase small properties that might be sold at from 500*l.* to 2,000*l.* or 3,000*l.* value? — Three years ago, I am perfectly sure that nothing could have been easier than to have divided large estates and sold them in small lots; and you would have had, what we particularly want in Ireland, a yeomanry, or even a peasantry, proprietary in fee. But I am afraid the emigration that has gone on for the last two years has taken away the class that we want, and they have taken their money with them; and it would be very

difficult to obtain those persons now ; but still it would, I think, be very advantageous to sell lands in small lots.

“ 10,294. *Mr. P. Scrope* : Will you state what difficulties you anticipate in finding purchasers at present ? — The reasons why I think at present it is very difficult to get any thing like a fair value for estates in Ireland are — first, that whatever are to be the ultimate effects of free trade, every one feels that at present, in going through the experiment, it has depreciated the value of landed property : whether that is to be a permanent depreciation or not, is another question. Then, again, I think the entire uncertainty of the amount of the poor-rate depreciates the value of landed property. I think, also, there is a scarcity of money in Ireland. I believe the returns from the banks will show that the circulation of Ireland has, in the last three years, diminished over a third ; and the circumstances of the country altogether, and the want of confidence produced by the famine, and the failure of the potato crop, have depreciated the value of landed property, rendering it impossible to get the same price for land now which would have been got some few years ago, and which, perhaps, may be got again.”

We have thought it right to state the opinions unfavourable to the measure as well as those favourable to it. It will be seen when the bill comes into operation whether a parliamentary title will not find favour in the sight of purchasers. In the conversation which took place on this subject in the Court of Common Council, the City Solicitor declared that in his opinion the Corporation of London ought not to lay out their money in Ireland without a parliamentary title. There is, however, one important point connected with a title of this nature which is pointed out, as well by those who are favourable to the act as those who are unfavourable. Thus Mr. Butt says —

“ I think the advantages of a parliamentary title are very much over-rated ; and it also occurs to me that a parliamentary title must run a very great risk of doing an injury to some person ; and I do not see in the end how it is to be carried out less expensively than by the ordinary process. Of course it cannot be proposed, and it is not proposed, by this bill to give a parliamentary title *without ascertaining every person who has an interest upon the land*. The bill provides that notice is to be given to all those persons who

are interested, and the investigations into the claims of all those parties must be carried on by the Commissioners. The difference between that investigation and the investigation at present made is this, the Commissioners are to carry on this investigation, and to give a parliamentary title, so that if they omit any person having an interest in the land, the party who takes the estate is not subject to any penalty. First of all, it will be very difficult to make the Commissioners conduct that investigation as effectually as the purchaser now does; the responsibility now thrown upon the purchaser of ascertaining who has in truth an interest, acts as a protection, and is, in truth, the only effectual protection that can be devised to absent parties; and the cost of the investigation will, I think, in the end, be as great carried on by the Commissioners as it would be if it were carried on by the purchaser. In both cases there must be searches for judgments and registered deeds; and if those searches are properly carried on in either case the title is perfectly secure.

"10,552. *Colonel Dunne*: But you consider that the Commissioners to carry out this act must be necessarily men deeply conversant with points of equity and law?—Decidedly; they must be good conveyancers, because they will have to inquire into the titles of property, unless it is intended by the act to sell bad titles.

"10,553. *Sir J. Graham*: Is it not *quoad* incumbered estates putting the Great Seal in Ireland in commission?—It is doing much more than that; it gives the Commissioners a power over incumbered estates such as the Court of Chancery never has had, and such as I think no tribunal ought to have. I find that the 20th section provides that the Commissioners shall ascertain the tenancies of the occupying tenant; and it gives the Commissioners a power to call upon all tenants and undertenants to produce their leases and show their titles,—that is, a kind of inquisitorial power; and unless the Commissioners insert the lease in the schedule of incumbrances to which the property is to be subject, the tenant's lease is at an end; so that it gives them a power not only of dealing with embarrassed properties, but it gives them a power of instituting an investigation into the title of every person who has a charge upon the estate, whether by lease or otherwise; and, unless they hold the lease to be good, the lease is at an end.

"10,595. And the whole of the property in Ireland that is in the least degree incumbered is at the mercy of those three Commissioners?—Not merely the whole of the property incumbered,

but the rights of the parties who may never be brought before them, and never heard of. For instance, there may be an estate in which the present owner has a defective title; the Commissioners do not see that there is a defect of title, and that the estate does not belong to him; and by their orders they may bar for ever the right of a party who was never thought of, but who was entitled to the estate.

"10,596. Is not the right of those Commissioners over the property in Ireland as despotic as the right of any monarch?—It is impossible to conceive any thing more so: the act gives them the power to vest the property of any person in any other person, free from all incumbrances and leases.

"10,601. Do not you think that, under the present circumstances of Ireland, it is necessary that an arbitrary power should be taken by the authorities, which would not be suitable to any other state of society; and that the Government would be justified, in such a case as the present, in taking powers which would not be justified under any other circumstances?—The answer to that question would depend upon the use that was to be made of those powers. In reference to the extraordinary powers that should be given to Commissioners for the purpose of improving estates, as has been suggested, I would be disposed to say that there are no powers too arbitrary, or which the present state of the country would not authorise. But the powers under this bill are given for another, and I think a totally different, purpose; they are given for the purpose of selling estates,—of transferring them from one proprietor to another. I do not think there is any such good to be obtained by such a transfer as to justify the extraordinary powers that are conferred on the Commissioners by this bill."

Dr. Longfield, who approves of the measure, points out the difficulty to which we refer.

"9310. Can you suggest any change in the present bill which would render it more efficient for the purpose than as it now stands?—I think the bill will be perfectly efficient. I will suggest a change in order to prevent its doing mischief. It gives what is called a parliamentary title to purchasers under it; I think that will be mischievous. The great protector of the rights of absent parties is the purchaser, who knows that if any parties are not brought before the Court, or if their interests are neglected, his title sustains a defect. He is therefore the real protector of

absent parties; but, if you give him a parliamentary title, he ceases to be so; and the whole conduct of the sale will be in the hands of a party who *will frequently have an interest in making an improper or dishonest sale*. I would therefore limit the security given to security against all parties and all incumbrances mentioned in an order accompanying the transfer; that will compel the purchaser, for his own sake, to call the attention of the Commissioners to any party who had registered a title, and which registered title appeared to have escaped the notice of those concerned in the suit; and then that party would be served with notice to come in and make his claim, or otherwise he would be included in the order accompanying the transfer.

“9315. *Mr. Bright*: If the certainty of the title being satisfactory is so great, is not the certainty equally great that, if the title were made a parliamentary one, no person would be injuriously affected by it?—No; because an equal vigilance of search would not be exercised. The purchaser would make no search, because he has a title; and the owner would make no search, because his object is to make a sale, and get the money.”

Lord Brougham stated a similar objection to the bill on the 13th of June last, at the public meeting of the Law Amendment Society in 21. Regent Street, as reported in the *Morning Chronicle* of the 14th:—

“His (Lord Brougham’s) objection to the bill was, that the three Commissioners might sell any estate on an application made to them either by the mortgagee or the owner. Now he might be in possession of an estate the reversion of which he might know was settled on another party who was ignorant of the fact. In such a case he would have nothing to do but to raise a mortgage of 20*l.* on the estate, and then get it sold by the Commissioners, to the entire ruin of the parties having the reversion. That was a difficulty which might be got over, but he did not know how; and, what was more, Lord Campbell, who had charge of the bill, did not know how either.”

Now, favourable as we are to this measure, we admit that this is a difficulty of grave magnitude, and which is to be got over only in one way. If the Commissioners are really to make bad titles good, and to injure the real owners by dealing in the parliamentary magic with which they are intrusted by the act, we do not see how the act is to be successfully

worked. Injustice is never done securely ; and although this parliamentary title may seem as secure as earthly omnipotence can make it, yet it may still be defeated ; or at all events the proof, perhaps the suspicion, of wrong having been perpetrated, will cloud and mar the operation of the act. Indeed, if there were any good reason to suppose that so gross a violation of right would be committed to any extent, that would be a good reason why the act should not have been passed at all. But as we believe that, in fact, injustice will rarely occur, we think it may be satisfactorily provided for by an application of the doctrine of insurance of titles, to the explanation of which we have repeatedly given a place in these pages.¹ If a small percentage of all the funds raised by sales under the act be set aside to meet just claims arising from interests overlooked on the examination of title, we believe that it will greatly help the working of the measure. If it be said that the owners of the good titles will then be made to pay for the bad, we answer that in the first place the expenses of all purchasers under the act will be greatly reduced ; but further, that all are equally interested in the general trustworthiness of the transaction, and that if any one sale under it is affected with substantial fraud, the integrity of the titles to the whole is more or less undermined. We trust then that the Commissioners will take this suggestion into their serious consideration, and provide for it under the rules which they are empowered to make for carrying the act into consideration. If the title is properly investigated there need be no fear of the fund failing. "I never knew," says Dr. Longfield, "a title in Ireland shaken in the slightest degree, except where there was gross neglect on the part of the purchaser, and when proper searches would have shown that the person was not buying the property of the proper person." (Q. 9324.) Indeed after a certain period had elapsed, the fund, subject to the demands made on it, might be restored to its original contributories. The rules, we presume, with Mr. Butt, will be made from time to time.

"10,243. Do you think it would be an advantage to require the approbation to those rules, previously to their coming into

¹ See 7 L. R., pp. 154, 384.

effect, of the Court of Chancery, or the Privy Council?—*Mr. Butt*: I should say that that would make very little difference. I do not think it is to be expected from human intellects, whoever the parties are who are to administer the affairs and complicated relations which that commission will have to administer, that they will *at once* prepare rules such as to be perfect and work out the object properly."

It need not be said that the Incumbered Estates Act is intended for the past and the present. The future remains to be provided for.

"9992. *Sir J. Graham*: Though this Incumbered Estates Bill gives facilities without expense to the first purchaser under it, without any alteration of the law generally as affecting the title to real property, great expense will occur hereafter?—Certainly; and of course that circumstance will diminish the selling value of land under the bill, because a purchaser in buying under the bill will calculate whether he can sell again, and he will be influenced in the money which he will give in buying under the bill, by the expense that he will have to incur if he goes to sell again."

We shall conclude our extracts from the evidence under the Poor Law Committee by one or two questions as to the effect on the profession of the proposed alterations under this act.

"9875. Do you think that the alterations which you have suggested would injure the profession of which you are a member?—No; I do not conceive that the legal profession can be injured by any thing which really benefits the community, but even if it were, it would be quite right to do so.

"9876. Do not you suppose that there would be a vast increase of transactions of every kind?—Certainly.

"9877. And a great increase in the productive power of the country and the accumulation of wealth, out of which your profession would gain very greatly?—Most undoubtedly, the number of transactions would be greatly augmented, though there would be a smaller amount of profit upon each particular transaction; and of course everything which benefits the community must benefit those who have to live on its produce."

This act, then, is fraught with important consequences to the public, both Irish and English. It has called into existence a new tribunal, intended to supersede, not indeed.

permanently, but still for a considerable time, one of the highest Courts in the kingdom, in the exercise of one of its long-recognised and most important functions. For centuries the Court of Chancery has been in the habit of administering, at the suit of certain classes of creditors, the estates of their debtors. It has done this not only after the death of the debtor, when it is a matter of course with that Court to ascertain all claims upon the assets of the deceased, real or personal, and apply those assets in their satisfaction; but during his life, at the suit of any person who has a lien upon his estate, it has been accustomed to summon all parties interested to its bar to adjudicate upon their several demands, and deal with the property in such manner as appeared equitably to meet them. Yet now it is deemed expedient, and in the judgment of a large proportion of those best qualified to judge on this matter, on sufficient grounds, to call into existence a new tribunal for the purpose of effecting more expeditiously, and more perfectly, the very same objects which the Court of Chancery has so long looked upon as its peculiar province, for the purpose of doing better that which, if long practice conduces to perfection in legal as in other matters, this Court might be presumed to have arrived at perfection in doing.

We have already stated our reasons for thinking this not only an advisable but a necessary step, and it has been hailed almost universally by both countries, as likely to lead to the most beneficial results. We have observed with pleasure that already the great capitalists are turning their eyes to Ireland with the view to investments in land. The Corporation of the City of London has led the way, and we have no doubt that the example will be followed. We know that two, at least, of the great Insurance Societies have already thought sufficiently well of Irish securities as to invest largely there already. It will be for the interest of these great monied bodies thus to support each other, and to find in the rich but uncultivated lands of Ireland their best and safest investment. We rejoice in this as citizens and subjects, but we also rejoice in it as law reformers; for it has now become the interest of all to secure large and efficient amend-

ments of the law, and more especially those connected with the Court of Chancery and the transfer of land. This movement has induced the Earl of Clarendon to write a letter, dated June 26th, to the Lord Mayor, from which we shall make one or two extracts, as greatly confirming the views which we have taken on the subject:—

“It is manifest,” says his lordship, “that a complete change of system as regards agriculture, the tenure of land, and the social habits of the people, has become indispensable, and that change can only be effected by the introduction of English capital, enterprise, and skill, in the manner contemplated by the meeting at the Mansion House. . . . I entertain no doubt that if good land is to be bought at a cheap rate, if secure titles can be obtained at a small expense, and if capital is available for improving the soil and rendering it productive, such an investment cannot fail to be profitable, but it is under these circumstances when the Incumbered Estates Bill is passed, that purchasers may come into the market. The moment, too, is eminently propitious for the undertaking, because political excitement is at an end, agrarian outrage consequent upon the competition for land, is now very rare, and the only anxiety of the people is to obtain employment. . . . It is a mistake to suppose that the Irish people will not work. They are both willing and desirous to work, and when in regular employment are always peaceable and orderly; and as they have lost their confidence in the potatoes, there will not now be the same difficulty, as in former times, in inducing the occupant of three or four acres of land to become a labourer for money wages punctually paid. I may add, also, that the tenant farmers now no longer adhere to their old and vicious system of cultivation, but are eager to learn, and are grateful for instruction.

“In short, from a concurrence of circumstances, I do not think there is any country in the world whose change could be as beneficially and speedily effected as in Ireland. . . . If the corporation of London would now turn their attention to Ireland, and prove that, in the opinion of the greatest capitalists and best men of business in the world, investments in Irish land are considered safe and advantageous, their example would be generally followed, and the well-being of this country involving, as it always must do, that of the United Kingdom, would then for the first time be placed upon a solid and permanent basis.”¹

¹ See Note A., *post*.

ART. VIII. — THE DOUGLAS COURT MARTIAL.

Proceedings of a General Court Martial, held at Guernsey, on Captain George Douglas, 16th Regiment. The Defence conducted by Samuel Warren, Esq., F.R.S., Barrister-at-Law. Edited (from Notes taken during the Trial), by H. Sholto Douglas, Esq., late Captain 42d Royal Highlanders.

IT has not yet been determined whether the gallant but unfortunate Admiral Byng was shot “pour encourager les autres,” as Voltaire said, or, according to Dr. Johnson, “fell a martyr to political persecution.” In either view he was unjustly condemned and cruelly executed. Captain Douglas has not been deprived of life; but a court martial has pronounced a sentence on him worse than death to a man of honour, unless supported by the consciousness of innocence.

We mean to examine the merits of this sentence; and to do so somewhat in detail; because, although Captain Douglas appears to have erred in judgment, and perhaps to have gone wrong on one or two points, the extreme severity of punishment inflicted upon him raises this grave and important question: Whether there is not something radically vicious in the constitution and working of our military tribunals.

In the lamentable case before us, a gentleman of ancient and honourable family — of which we have heard that he is the head and representative — and whose high character was attested before the Court by many eminent personages in the service, who spoke of him as a first-rate officer, and as a man of sensitive honour, “free from all stigma or any thing in the way of blemish or reproach”¹, has been found guilty of every charge brought against him, and ignominiously cashiered: that being the severest sentence the Court had it in its power to inflict.

This was said by Lieutenant-General Sir William MacBean, K. C. B. — *Proceedings*, p. 50.

The main facts may be stated in a few words: —

On Saturday, the 6th January last, a bullock belonging to a farmer at Alderney, named Bissett, was found on the sea-shore, dead, and with a wound in the neck which was at the time thought to have been made by a bullet. This led to inquiry, when it turned out that about mid-day on the preceding Friday, firing had been heard at Longy Battery, a spot near the Barracks, where Captain Douglas with his detachment were stationed; and as the animal had been seen grazing in that neighbourhood about the same time, Bissett caused a constable named Renier to go to the spot where such firing had been heard, and there he found a number of flattened bullets, exploded percussion caps, and a fragment of a *Times* newspaper, with the address of Captain Douglas written upon it. The carcass was immediately examined carefully by the constable, but no bullet, nor any exit for one, was found. The first intimation of these circumstances made to Captain Douglas, was by a gentleman named Bains, on the Monday afternoon, who met Captain Douglas, with two brother officers, walking towards the town. In answer to a question by Captain Douglas, as to what news was going on in the town, Mr. Bains jocularly replied that there was nothing new since his (Captain Douglas's) sport with the *Bulls of Bashan*, at Longy. On hearing this, Captain Douglas said, "Why, you don't mean to say that I am charged with having any thing to do with it, do you?" Mr. Bains answered, "Indeed you are; you will find the constable at your quarters about it on your return." Mr. Bains then said, "But it is true that you and Parker (a junior officer of Captain Douglas', and who was then present,) were ball firing there, is it not?" To which Captain Douglas replied, "*Yes, we were practising*: but I know nothing about the death of the bullock." The witness was then asked whether Captain Douglas made any mystery or concealment of his having been firing there? to which the answer was, "None, whatever." Shortly afterwards they parted, and Captain Douglas repaired to his quarters. Soon after he had reached them, Renier, the constable, came to him, and saw him at the door for a minute or two; and it is on what *passed*, or is supposed to

have passed, that the serious charge of falsehood on the part of Captain Douglas is founded. On the ensuing day, a kind of inquest was held, at the instance of Mr. Bissett, in the Civil Court, to discover, if the animal had been shot, who had perpetrated the act. Here, it seems, the witnesses are examined privately, one by one; and on the constable being called into court, he said, among other things, that on the preceding day he had asked Captain Douglas, "S'il avoit connaissance de celui ou ceux qui avaient tiré à balles dans la batterie?" and the constable said, "Il me dit que non." The witness then said he told Captain Douglas that a newspaper, with his name on it, had been found in the battery: to which Captain Douglas answered, that he had five or six papers a week, and they went round the barracks and in the town, and that he was not accountable for his papers when out of his hands. Shortly after hearing this witness's evidence, Captain Douglas and Mr. Parker were called upon by the Court, and the Judge thought proper to put to them the following question: "Whether, as gentlemen of honour, they had any knowledge who had shot the bullock in question?" and they answered in the negative. The Judge then put a second question to Captain Douglas, "Whether he could account for the *Times* newspaper, with his name on it, being found in the battery?" to which he replied, "That he was not accountable for his papers, as they travelled through the barracks, and even in the town." With reference to this latter answer, Captain Douglas, in his defence before the court-martial, made the following observation: "I was hurt at such a question being put to me by the Judge after he had put me on my honour, as an officer and a gentleman, to the main fact on which he had required me to answer on my honour." The owner of the bullock was then called before the Court, and, it seems, made statements strongly tending to inculcate Captain Douglas as the shooter of the bullock; but at the close of the day the inquiry was indefinitely adjourned, to give time for procuring further evidence, if any could be obtained. Nothing further seems to have been done till the 5th February, when a strong paragraph appeared in the *Comet* newspaper, in rather violent terms, charging Captain

Douglas and Mr. Parker with having shot the bullock ; and in the same paper a reward of 20*l.* was offered, "to any one giving information *sufficient to convict the party or parties who were shooting* IN THE BATTERY on Friday, the 5th January." On the ensuing day Captain Douglas received a letter from Major-General Bell, reciting the above facts, and requiring him and Mr. Parker "to make whatever counter-statement they might have to make in rebutment of the allegations brought against them." On the 11th February Captain Douglas wrote to Major-General Bell, solemnly repeating upon his honour, that he knew nothing whatever about the death of the bullock, and complaining how much he was hurt "at his word being questioned for the first time during a period of nearly thirteen years' service in every part of the world." He also made various statements, all of them, as was ultimately shown, accurate in point of fact, tending to show how improbable it was that either he or Mr. Parker could have shot the bullock, and how very probable it was that the act had been done by some person or persons who had a grudge against the owner of the bullock. The letter was silent as to the particular fact whether the writer had or had not been practising pistol firing at the battery on the 5th of January. On the 15th of February a Court of Inquiry was held at Alderney, at the request of Mr. Bissett ; and the letter of instructions stated the object of the Court's assembling to be, "to ascertain whether any person or persons belonging to the garrison were engaged in firing with ball within or immediately adjoining Longy Lines on the day and within the hours specified in several of the documents laid before them." This, however, was not communicated to Captain Douglas, who voluntarily attended the Court on the first two days of its sitting, and heard witnesses examined, from whose evidence it appeared clear that, whoever shot the bullock, if it had been shot, it could not have been Captain Douglas or Mr. Parker. On this the two officers in question immediately communicated to the Court of Inquiry, in a "frank, straightforward manner," the fact that they had been firing at the time and place in question ; and on the ensuing

day voluntarily made a corresponding statement to Judge Gaudin, the Judge of the Civil Court. On hearing this explicit avowal of a fact which had not been stated on the former occasion (the Judge stating that he had not asked any such question, but had advisedly abstained from doing so), the Judge put the following question to Captain Douglas : — “ Can you give me any reason why, on the 9th January last, you did not tell us you had been pistol-practising on the Friday in question ? ” Captain Douglas answered — “ I did not say so because it would have been difficult for me *to prove I had not shot the bullock*, had it been known I had been shooting there.” The Judge then put two other questions, without giving Captain Douglas the least intimation of his reason for doing so — which was, in fact, the question and answer which Renier had stated on the 9th of January had passed between him and Captain Douglas : —

“ One of the constables called on you inquiring for evidence ?
A. He did. — *Q.* Pray tell us the impression you have of the questions he put to you ? *A.* He told me some one had been firing in the battery, and he asked me whether Mr. Parker, or myself, or any one about the barracks, had shot the bullock ; and I told him we had not done so. — *Q.* Am I to understand that the constable asked you whether you or Mr. Parker had shot the bullock, or whether he asked you if you had been firing in the battery ? *A.* He only asked me whether Mr. Parker or myself had shot the bullock ? ”

The Civil Court, on the 1st of March, pronounced their judgment, exonerating Captain Douglas and Mr. Parker from all suspicion of having any knowledge of the means by which the bullock had been killed, and even stating, “ that it was doubtful whether, after all, the bullock had died by the effects of a bullet.” It seemed reasonable to expect that, by this time, there was an end of the whole of what would appear a very tiresome and ridiculous affair. Such, Captain Douglas says in his “ defence,” was *his* opinion ; more especially as he had expressly offered, before the Court of Inquiry, to go over to General Bell, and make any further statement which he might require. *Sed Diis aliter visum.* On the 10th of March he was placed under arrest, without any reason why, till he

received, ten days afterwards, the four charges on which he was tried. They were, in substance, as follows: — *First*, for having falsely told Renier, when asked by him whether he, Captain Douglas, knew who had been firing in the battery on the 5th of January, that he did not know. *Secondly*, for “omitting,” “neglecting,” and “refusing,” to acknowledge the fact of his having been firing on that day to Judge Gaudion, on the 9th of January; and to the Court of Inquiry, on the 15th and 16th of February, intending to conceal that fact, though knowing that the object of inquiry before both courts was to discover who had been firing on that day, and especially whether *he* had. *Thirdly*, for having answered evasively to Judge Gaudion, on the 9th of January, concerning the *Times* newspaper found in the battery. *Lastly*, for omitting to state, in his letter to General Bell, that he had been firing on the battery on the 5th of January; and also evasively suggesting, in order to conceal *his* having been then firing there, that others had been doing so.

Now the defence of Captain Douglas stood substantially thus. He strenuously and indignantly denied that Renier had asked him who had been firing; insisting on it that the only question he had asked was, after *asserting* that there had been firing there, and a bullock had been shot, whether he, Captain Douglas, had shot, or knew who had shot the bullock. He protested that all the three ensuing charges were bad in law and false in fact. Bad in law, because they charged no offence, for he had a right to omit and refuse to answer questions anywhere which he believed might involve him in liability — civil, criminal, or military. That he knew all the while that he was perfectly innocent of being concerned in the death of the bullock, or knowing anything about it. That his denial, on his honour, before Judge Gaudion, of knowing anything about the transaction, ought to have been conclusive; that he considered his answer — which was true, in fact, about the newspaper — a justifiable parrying of an unjustifiable question; that he had never refused, because he had never been asked, to acknowledge whether he had been firing; that neither the Civil Judge nor the Court of Inquiry apprised him of the object with which their courts were

sitting; and that as to the letter to General Bell, he had not improperly evaded answering a question, but had fairly met it, according to his views of its true drift and object; that his caution in not supplying evidence against himself was amply justified by the civil proceedings pending over him, which sought to fix him unjustly with liability for an act which he knew he had never done; that a reward was offered for convicting those who had been firing on the battery; that he had a right to place the whole onus of proof on those who sought to make him liable, and was not bound to volunteer admissions against himself; that he would have gone at once and admitted the fact in question to his resident superior officer, Colonel Le Mesurier, but was prevented by that gentleman's bitter hostility; that when he found that gentleman the President of the Court of Inquiry, he felt justified in exercising great caution; that he consulted a recognised work on military law before attending the Court of Inquiry, and found that he had a perfect right to refuse to make any statement or answer any question; but that, nevertheless, he *did* answer all questions, and made a true and honourable statement of all he knew the first moment that he found he could do so safely; that, if in parrying Judge Gaudion's question, and keeping silence about the firing on the 5th of January up to the time of his avowing it, he had done wrong, it was an honest error in judgment. He complained strongly of the charge of falsehood being trumped up against him without his ever having had an opportunity of denying or disproving it; and insisted on the high character which he had ever maintained in the service down to the hour when he was accused of the offences on which he was being tried. All these topics were urged in his "defence," which appears to us as clear, convincing, candid, and straightforward, a defensive exposition of motives and conduct, as ever came from the lips of one accused. It proved, however, wholly unsuccessful. The prisoner was found guilty — with a trivial exception as to one of the matters included — of every one of the charges — and CASHIERED!

The Court proved itself wholly unequal to the duties imposed upon it; and we have no hesitation whatever in

expressing our opinion — which we shall proceed to support by conclusive evidence — that Captain Douglas has been tried and convicted erroneously and unfairly ; that he has, in short, not been *tried* — in the proper sense of the word, and according to the established and familiar modes of trial in this country — at all.

The first and only serious charge is that of falsehood ; and it is here that the Court appears to us to have miscarried miserably.

It is almost an insult to remind *our* readers of the rule, that a charge of perjury cannot be maintained on the mere opposition of one oath to another oath ; for which reason two witnesses are requisite ; or if there be only one, the evidence of that witness must be clear, and it must be strongly confirmed, not in slight, but essential particulars, in order to overcome the presumption of innocence and counter-vail the oath of the accused. We feel an apology necessary for thus recurring to the A B C of our ordinary jurisprudence ; but of that very A B C the Court Martial appear to have been profoundly ignorant. In no other way can we account for the astounding verdict of guilty on that charge. The question was one obviously and purely of *words* — its solution depending on the eliciting from the witness what were the *precise words* used by him to the accused, on the occasion which was the subject of inquiry. The charge is, that a particular *question* received a particular *answer*. What, then, was that question ? What was that answer ? Now any *tyro* at Sessions would, on the present occasion, have proceeded in some such way as this : — “ Did you see Captain Douglas on such and such a day ? Tell us exactly what passed between you, and as nearly as possible, in the very words. Did you ask him any question ? What question did you ask him ? Did he give you any answer ? What was his answer ? ” If all these questions failed to elicit satisfactory replies, from a defective perception or memory on the part of the witness, it might be allowable *cautiously* to direct his attention to the point of inquiry. Thus — “ Did you say anything, or ask any question, about firing in the battery ? What did you say about it ? What did you ask

about it?" The only object, of course, being to elicit truth; and that on a question of such paramount delicacy and vital moment as far as the accused was concerned, it was scarcely possible to be too careful in examining such a witness as the sole witness on whose evidence this unfortunate officer has been cashiered as a deliberate liar. Let us now see how the Judge Advocate and Court dealt with this witness. It may be necessary to remark that the Judge Advocate was a young officer in the Grenadier Guards.

The precise charge against Captain Douglas was—"For having, when asked by constable Renier whether he had a knowledge of the person or persons who had *been firing ball* on the ramparts of Long Battery, on the 5th of January, 1849, answered that he had no knowledge of such person or persons."

The very first step taken by the Court was a blunder. *They read over the charge to the witness*; thereby suggesting to him the very words he was coming to depose to, and in so critical a verbal conflict! Having ascertained that he saw Captain Douglas on the 8th January, the following question, perfectly unobjectionable in its form, was put to the witness:—

"State why you saw him, and what took place on that occasion?"
A. I was sent by Judge Gaudion, of Alderney, to inquire about a bullock that had been shot. I was sent because I was constable. I asked him if he knew any thing about it, and he said no. I asked him if he knew any thing about a bullock that had been shot, and if he had been firing on the 5th of January on the ramparts. I told him that it appeared there had been ball-firing in the battery. His answer was, we have had no ball-firing since we have been here. Then I told him that the *Times* paper had been found there, with his name on it, in the battery, dated the 22d of December. His reply was, that he had five or six papers a week, and they went round the barracks and in town, and that he was not answerable for his papers when out of his hands. That is all the conversation we had, or something of that sort, and I left him."

This being his examination in chief, Capt. Douglas,—doubtless perceiving that the evidence had fallen far short of the

mark at which it had been aimed,—by leave of the Court, reserved his cross-examination till the close of the prosecution. From that cross-examination we extract the following questions and answers, which we request our readers to combine with the examination in chief:—

“ Q. As you were sent by the Judge to inquire about a bullock which was said to have been shot, did you ask me if I knew who had done it? A. No.— Q. Did you then say nothing whatever to me about a bullock having been shot? A. Yes, I did; I said what I stated to the Court the first time. I asked him if he knew any thing about the firing which had taken place, or the bullock which had been shot on the Friday the 5th.— Q. What was my answer to that question? A. No; he knew nothing about it.— Q. Did you say that there had been firing at or near the Longy Lines, and that it was supposed a bullock had been shot there; or words to that effect? A. Yes; I did say words nearly to that.”

And let these answers, again, be compared with the version of the constable's question given by Captain Douglas to Judge Gaudion (*antè*, p. 382.) as the impression he had at the time of the question which the constable had put to him. “ He *told* me some one had been firing in the battery; and he *asked* me whether Mr. Parker, or myself, or any one about the barracks, had shot the bullock; and I told him that we had not done so.” Again: couple this answer with the evidence of Ensign Parker before the court-martial, whom he informed that, only a few minutes before the constable saw Captain Douglas, the former met him, Ensign Parker, and said, “ He told me a bullock had been killed round by the battery, and asked me if I knew any thing *about it*.” Again, the constable admitted, on cross-examination, that, after asking Ensign Parker this question, he told that officer “ that he was going up to Captain Douglas to inquire on the same purpose:” and, finally, Ensign Parker stated that, on the same evening, he, Captain Douglas, and others dined together; and, on his mentioning what the constable had said to him, Captain Douglas casually observed, “ that the constable had been to *him*, and asked him whether he knew any thing of the *death of the bullock*.” Now, on bringing the different points of the evidence together,—independently of the anni-

hilating effect of contradictions of this solitary witness on essential parts of the evidence, and of all the probabilities of the case,—they appear to us to approach very near to positive demonstration that the constable's evidence is utterly erroneous, whether intentionally or unintentionally it is no province of ours to determine; that he must either have actually asked the question which Captain Douglas represents him to have asked, or that Captain Douglas must have understood him to ask that question, and could never have applied his answer to any other question. We have grouped these circumstances thus together in order to arrive at what we believe to represent the true transaction,—the real features of the case. Let us now proceed to show how the Court dealt with this critical and all-important witness. Notwithstanding their allowing Captain Douglas to postpone his cross-examination, they interpose themselves, in the most unpardonable manner, for the purpose of apparently forcing out of the witness's mouth the *ipsissima verba* of the charge! and ask him the following question: "Did you ask Captain Douglas whether he knew *who the person was who had been firing?*" Even this question, however, fails to elicit an answer satisfactory to the querist. "I asked him if he knew the person who had DONE IT, meaning the shooting." This he finally corrected by saying, "I did *not* ask him if he knew *the person*, but if he knew *any thing about it*;" again letting in the whole ambiguity, and essentially corroborating the evidence above given on behalf of the accused. The Court, having then asked a flagrant leading question, proceed to commit a solecism such as we could not have supposed possible but for the twice-repeated statement in the record before us. "What do you mean by '*had done it?*'" Here we perceive Mr. Warren's instant—and it must have been indignant interposition. "Captain Douglas here begged to say, that he considered the question objectionable. The point was not what *the witness meant*, but what he *said* to Captain Douglas at the time, so that the Court might be placed in the position of persons present at the interview between himself and the constable." Could anything have been plainer than this appeal to first principles? The Court, however, was

cleared, showing the importance they attached to the question; and on the Court being re-opened, they announced their decision—"The Court decides that there is *no objection to the question!*" and they proceed thus to enforce their decision. "Referring to your former answer, what did you mean by 'had done it?'" To which the witness at length answers—"Had been firing there—that is what I *meant*." We are compelled to ask with sorrow and indignation, whether anything can be conceived more deplorable than this exhibition of judicial incapacity?

But for the honourable character of the members of the Court it might really appear to one inclined to deal severely with them, that they had resolved, *coute qui coute*, to make the witness prove the story as it was set down for him! Now, however, for another aspect of this part of the case, — its probabilities. It was proved first, as will be remembered, that Captain Douglas had openly stated the fact of his firing in the presence of two officers and a civilian, only some half-hour before he is represented as deliberately denying the fact to a messenger from a Judge, denying it, too, in the face of the fact brought to his notice by that messenger, — viz. that a newspaper, with the name of Douglas, had been found on the spot; two circumstances which would argue such a degree of infatuation and audacity, as nothing but insanity could account for. But the case is not left here. That this constable's memory, or his honesty, cannot be safely relied on, is clear from the following important contradiction to his testimony elicited before the Court. First, he distinctly swears that he never had any interview whatever with Lieutenant-colonel Le Mesurier on the subject of this question and answer; but when that gentleman is called he flatly contradicts the assertion, and declares that Renier was sent to him by the Judge, and, on being questioned by the Colonel, assures him that what he had stated on the subject was correct! Which is to be believed, the Colonel or the Constable? How is Captain Douglas's pointed question to be answered?¹ How could Renier have *forgotten* so unusual a circumstance as his being sent by the *Judge* of the Island to the Town-

¹ Pp. 36—38.

major on a subject of such importance, involving the honour and veracity of an officer second in command in the island?

There are three or four other similar contradictions established, into which we need not enter; for one such as the above is "as good as a hundred." On turning to page 44. we find the following most important evidence given by Ensign Parker in favour of this deeply injured Gentleman:—

"Q. Did I ever say any thing to you about admitting or denying that we had been firing on the 5th January? A. Yes: that it would be better for us not to admit that we were firing there under the circumstances; at the same time we must not deny having done so. I think this was on the 8th—the first time Captain Douglas said it.—Q. Did you ever hear me deny it? A. Never.—Q. Have I all along told you that if we did say any thing we must adhere to the truth?—A. Yes."

Colonel Le Mesurier himself testified before the Court to the unquestionable veracity of Captain Douglas¹—"that he was incapable of uttering wilful falsehood to anybody;" while six officers, several of the highest rank, also bore testimony to his spotless integrity, veracity, and "sensitive 'honour' throughout life." Yet all in vain! This incredulous Court has deliberately believed the confused contradictory statement of an ignorant constable, and disbelieved the solemn, distinct, and reiterated statement of Captain Douglas, and dismissed him with infamy as a LIAR!

Now we appeal to any reader, lawyer or layman, whether the fundamental principles of justice have not been wholly lost sight of, and unconsciously violated, by this court martial? Who could not prove *anything* against *any body* by such means as they resorted to? Who could have exhibited a more complete blindness to the true aspect and bearing of facts? It were a mere waste of time to pursue the subject, except to ask, with concern and amazement, how can the authorities at the Horse Guards have been advised by the Judge Advocate General to act upon this monstrous mass of absurdity, and inflict on the victim of it irreparable degradation and ruin? This question, however, has, unhappily, a far more extensive application, with reference to the lament-

¹ Pp. 49, 50.

able proceedings before us, and such as will, we believe, enforce on all persons competent to form an opinion the absolute necessity of a complete alteration of the present system for administering military law. There is scarcely a page of the proceedings which does not afford conclusive proof of the incompetency of the Court to conduct a judicial inquiry, especially one of such delicacy and responsibility as that which had been intrusted to them. We can select only one or two, with reference to our limits.

The rest of the inquiry respected alleged suppression of truth and evasion on the part of Captain Douglas. The second count charged him with "omitting, neglecting, and refusing" to own the firing before both the civil and military courts. But here, we dare say, all our readers will ask the question which occurred to ourselves,—“was it the *duty* of Captain Douglas to communicate that fact?” In the ‘Preface’ to the Report of the Proceedings, Captain Sholto Douglas tells us that Mr. Warren had sarcastically informed him that ‘even Judge Jeffrey held sacred the principle that no one could be compelled to criminate himself, or answer questions having that tendency.’ And we find Captain Douglas in his defence strenuously insisting on that topic, and challenging his prosecutor to show it to have been his duty to make such statements spontaneously or otherwise. We are not surprised to find the challenge unanswered! We have searched in vain the Articles of War, the Queen’s Regulations, the Mutiny Act, and every book of military law that we could procure, for any statement of such a duty as Captain Douglas denied. There is none such—British jurisprudence repudiates it, and on the contrary Captain Douglas established to demonstration the very reverse: that an officer is *not* bound “to take any part in the proceedings of a Court of Inquiry, and might decline to answer any question,” or *make any statement* which might, “*in his opinion*, have proved prejudicial to him in the course of any ulterior inquiry into his conduct.” These are the words of his late majesty embodied in a General Order of the Horse Guards, July 3. 1809, in confirming the proceedings of a Court Martial! Captain Douglas dwelt upon this “cardinal rule,” long and forcibly in his

defence, but in vain. Connected with this part of the case, however, is an act of astounding impropriety imputed to the President, at page 45. of the Proceedings before us. It had just been established by an officer, then under examination for the defence, that Captain Douglas had consulted a standard book of military law ("Simmons on Courts Martial"), just before attending the inquiry mentioned in the charges, to ascertain what his rights as an officer were, with reference to making statements and answering questions of this description. We quote the words of the report, to prevent any imputation of error to ourselves.

"Q. Do you recollect my going to the Court of Inquiry?
A. Yes.—Q. Do you recollect my pointing your attention to a passage in 'Simmons on Courts Martial' before we went? A. Yes; I do. (The Court was cleared, to consider whether this question should be allowed. It was decided in the affirmative.)
—Q. Is this the passage, page 97., 3rd edition? A. Yes; it is (looking at the book). Captain Douglas then handed the book in question to the Judge Advocate, requesting him to read to the court the passage referred to by Ensign Parker. The Deputy Judge Advocate was proceeding to do so, when he was stopped by the President, who said, 'Oh no, we will have no law books read here.'"

Is not this really outrageous? what palliation can be offered for such conduct? The president of a court engaged in a solemn inquiry into the conduct of a brother officer to ascertain whether he is acting "*bonâ aut malâ fide*," peremptorily excludes evidence of the most decisive character, and which, as we have seen well observed, would have thrown a flood of light on the motives and conduct of the accused at the very moment to which such inquiry was directed, and might have changed the opinions of every member of the Court! How is it possible for a conviction thus obtained, to stand? Why did not the Deputy Judge Advocate, thus stopped in the act of honestly doing his duty, explain to the President that he was acting illegally? And again, we must ask, how can the Judge Advocate General have solemnly sanctioned this signal solecism also? Has it been brought under his notice in the official proceedings?

Here is an officer cashiered for "conduct unbecoming the

character of an officer and a gentleman," in the teeth of evidence rejected, which would have shown an honest anxiety to act according to the established rules of justice and of military law — referring to it for his guidance, under very trying circumstances — to protect himself from the consequences of his superior officer's alleged hostility ! This, however, leads us to another source of wonder and concern, developed by these remarkable proceedings. It was obviously an essential part of Captain Douglas's case in defence, to show that his conduct was governed at the time which was being inquired into, by a *bonâ fide* and well founded belief that he had cause for acting guardedly, to avoid placing himself within the power of a hostile superior. That hostile superior appeared as a leading witness against him before the court martial, and gave (in the most irregular manner, in spite of Captain Douglas's repeated remonstrances) decisive evidence against the prisoner. When the latter proceeds to cross-examine him, of course he puts questions tending to establish the fact of this hostility : when the President again interposes, — we again quote : —

‘ The President here turned to the witness, and told him that he was not bound to reply to any question tending to show hostility on the part of the witness towards Captain Douglas, and that such was his object in putting such questions.’¹

What words are strong enough to characterise adequately this procedure ? We think that the prisoner would have been justified in withdrawing from the inquiry ; for this step was taken by the President after the prisoner had addressed, in lucid and convincing terms², an argument to the Court in vindication of his right, in which he complained strongly of being thus “ shut out from every means of questioning the conduct and motives of the witnesses brought forward for the prosecution against him ! ” He was thus practically prohibited from cross-examination of the witness whom he had in distinct terms openly stated to the Court that he challenged as the actual getter-up of the proceedings against him³, and “ *knew* his intentions and feelings to have been

¹ P. 36.

² P. 33.

³ P. 20.

hostile towards him!" Thus protected by the spontaneous act of the President (for the witness had made no appeal for such protection), Colonel Le Mesurier refused to answer many of the most serious questions of the prisoner; and several questions wearing a very grave air, and evidently pointing to something of great significance in the back ground¹, the President even refused to allow the prisoner to put at all! These questions, however, the prisoner demanded to have recorded, together with the President's rejection of them. Surely this incomprehensible and unprecedented conduct of the President reduced the prisoner's defence to nearly a farce—but a very black farce as far as he was concerned. We again ask how the Judge Advocate General can have suffered all these objections—totally invalidating the finding and sentence—to pass unobserved, and advised the confirmation of the crushing sentence so obtained? We feel it necessary again to state, that we take it for granted we are dealing with an accurate account of the proceedings; and we presume that they must contain entries tallying with those appearing in the official proceedings returned to the Horse Guards, and we greatly regret the existence of the rule which deprives the prisoner of the means of at present obtaining a copy of the official proceedings.

We had marked for quotation and comment many other instances of really childish ignorance of the method of conducting a trial;—errors uniformly persisted in by the Court after the formal objections of Captain Douglas, and errors always telling *against* the prisoner. Our space, however, compels us to pause, and to proceed to the main object which we have in view in noticing these singular and melancholy proceedings; for, judged by their result, they are melancholy enough. Here is a British officer who has suffered the extreme penalty of military law, inflicted by a tribunal exhibiting in its conduct of the case glaring incompetency for its duty. A man who, up to the moment of the absurd occurrences which led to the assembling of the Court, is admitted by the Court itself, in its sentence, to have borne "so high a character" that they "recommended his case to the favourable consideration of her most gracious Majesty,"

¹ P. 31.

is abruptly and ignominiously discarded from the service, and, as far as the Court could effect it, from the society of gentlemen; and in doing so, the Court leap recklessly over every barrier that the law had placed around injured innocence,—in the spirit of the very worst Star Chamber practice.¹

Before closing our remarks on this case we would earnestly urge upon the Legislature the necessity of essentially remodelling the construction of courts-martial. We are aware that they have long been looked on with dissatisfaction by even military authorities; and now that such a grievance as the present has arisen, the public and the army will insist on means being taken to prevent its recurrence.

When we reflect that there are, as we believe, upwards of five thousand courts-martial held every year; that these courts are invested with great powers over all subject to them—officers, commissioned and non-commissioned, and privates,—it is obviously of the greatest importance that such courts should be constituted effectively. If the court which tried Captain Douglas—consisting of officers of considerable distinction, with a vigilant advocate present to call their attention to the rules of evidence,—have miscarried so grievously, what may not be apprehended in cases where no such favourable circumstances exist? What an amount of anguish,—of irreparable wrong,—of ruin,—may not have been inflicted, or be now constantly but unconsciously inflicted! Now the first practical suggestion which we would offer is, that henceforth no *general* court martial, at all events, should be held, unless the acting Deputy Judge Advocate be a barrister of standing and experience,—say of the rank of Queen's Counsel, or of at least ten or fifteen years' standing at the Bar. He should be the responsible conductor of the prosecution, and, at the same time, the responsible adviser of the Court; but his advice should be given openly, in order that the public and the accused may have an

¹ Unfortunately for Capt. Douglas, his able counsel was not allowed once to open his mouth; the Court ruling that, although they suffered Mr. Warren to be present as the defendant's "friend," he must not "interrupt the proceedings" by speaking! He, however (as we perceive), took care that their blunders should be made *matter of record*.

opportunity of judging of the soundness of his rulings, and be satisfied that there is no perceptible bias towards the prosecution. At present the Deputy Judge Advocate is a military officer, with no restriction, that we are aware of, as to experience or standing, and no security for his acquaintance with even the elements of the law of evidence. He may, in fact, know far less on these matters than any member of the Court of which, nevertheless, he is the sworn adviser! Again: whenever a doubt is raised or an objection taken as to the propriety of allowing or disallowing questions, or receiving or rejecting evidence, or adopting any particular mode of procedure, according to present practice the "Court is cleared" of every body except the members of the Court and the Deputy Judge Advocate—the *prosecutor*; and the accused has no means of knowing what advice his opponent is giving his judges! It may be most erroneous; it may be greatly, but unconsciously, warped and biassed by the prejudice of his position! Why should not this be altered? Why should not the Deputy Judge Advocate state his reasons openly before the Court and public, and then retire equally with the prisoner, his friends, and the public, while the Court is deliberating? In short, we would have a legal *assessor* present to give effectual guidance to the military members of the Court, standing indifferent between the prosecutor and the prisoner. Had such a functionary been present at the Guernsey Court Martial, would its proceedings have been disfigured by the many inaptitudes which at present characterise it? The present was a case peculiarly calling for experience in judicial investigation, trained temper, and trained intellects. Very complex is the form of the charge; and the Deputy Judge Advocate ought to have explained to the Court, especially when challenged by the prisoner to do so, what was the *military law* which he was charged with having violated. That was not done in the present case; and the prisoner was driven, in his defence, to speculate upon what the Court might think proper to consider as the law. Ought this to be so?

Again, the method of conducting the proceedings solely by written question and answer is a monstrous inconvenience, leading to a needless and inexcusable waste of time, and also

calculated to obstruct the administration of justice. A written question is proposed by either party, or by the Court: it is, when approved by the Deputy Judge Advocate, read aloud to the witness, who does not, however, give his answer till he has had an ample opportunity of considering it, while the Deputy Judge Advocate is writing down the question! How can a *cross examination* be effectual under such circumstances? What we recommend is, that the questions and answers should be *vivâ voce*, and that the Court should be attended by a sworn short-hand writer, just as are committees in parliament. If this was done in the court martial under consideration — especially if a moderately skilful professional man had conducted the proceedings — instead of eleven days, the whole case might have been easily disposed of in two or, at the most, three days; and a great saving of expense effected both to the public and the accused. Again, the prisoner should be allowed the unrestrained and effectual assistance of counsel, if he should think fit. At present counsel are tolerated only as private “friends” — who can do nothing but sit in silence and write? Why should this be? Is it not mere trifling and indicative of a childish jealousy? Counsel is known to be present; but why should not that presence be professedly recognised, and why should not counsel be allowed *in propria personâ* to discharge the duties of counsel, especially in examining and cross-examining? When the inquiry is over, the proceedings should be transmitted to the Judge Advocate General, without any communication between that functionary and his deputy, in order that the former may form a perfectly independent and unprejudiced judgment concerning the proceedings; and he should always be a *common* lawyer of high standing and experience. The moment that the pleasure of the Sovereign has been taken on the subject, and the result communicated to the prisoner, he should be allowed, at his own expense, a copy of the proceedings — in order that he may at once take proper advice, with a view to discovering matter justifying a prompt reconsideration of the case. It would not be difficult to devise a much more satisfactory system of revision and appeal than the existing one. If,

however, it be deemed expedient to adhere to it, we think that some means should be adopted for lessening the difficulty of redressing any error of judgment by the Judge Advocate General, before it is acted upon. Why should not the prisoner have the result of the trial, and its proposed confirmation by the Sovereign, communicated to him before it is officially acted on and published, to give him the opportunity of calling the Judge Advocate General's attention to certain points of the case, deemed to have been overlooked or misunderstood; and on that re-consideration having taken place (amounting simply to asking a prisoner what he has to say why judgment should not be passed and the sentence be carried into effect) at the prisoner's instance, he could hardly afterwards object, as Captain Douglas may now object, that he has not had a fair trial, or the Judge Advocate General has misconceived the case. Had this course been adopted in the present instance, Captain Douglas might have been spared the agony occasioned by the publication of an unjustifiable conviction for falsehood, sanctioned by the approval of the Queen.

These are a few of the suggestions which we would throw out for the consideration of those who have the power of remedying the faulty action of a section of our military jurisprudence. A case like the present speaks trumpet-tongued to all who are interested—and who is not?—in the welfare of our army. It is really frightful to think by how frail a tenure an officer holds his honour, when he may be deprived of it as Captain Douglas has been. The proceedings of this Court Martial are only the caricature of a judicial investigation. Where there is a wrong, there ought to be, or there should be found, a remedy. In the present instance, the hard case of Captain Douglas calls loudly for redress, either by an appeal to Parliament or to the Judicial Committee of the Privy Council, to whom the Queen, we conceive, might be petitioned to refer the matter, under the 3 & 4 W. 4. c. 41.¹

One more practical suggestion, at parting, we would offer

¹ By the 4th section of this act, the Queen may refer to the Judicial Committee any matter whatever that Her Majesty may think fit.

— that every officer should be required to apply himself to the study of at least the elementary rules of the Law of Evidence, to enable him to discharge the serious duties which devolve on every officer, or president, or member of a court martial. His proficiency in this matter should form one of the subjects of that preliminary examination of officers which has been recently prescribed by the Duke of Wellington. This would be but carrying out the spirit of the following weighty "Instructions," contained in the Queen's Regulations and Orders for the Army.

"The duties devolving on members of courts martial are of the most grave and important nature, and, in order to discharge them with justice and propriety, it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law."¹ The proceedings of Captain Douglas' court martial afford a melancholy, but instructive, commentary on this authoritative recommendation: we recommend them to the perusal of every officer, whatever be his standing.

ART. IX — REFORM IN LAW REPORTING AND LEGAL PUBLICATIONS.

WE now propose to undertake another reform of an abuse closely affecting the practice of the law, which has already not entirely escaped our notice. The complaints with respect to it are of as old a date, as universal, and nearly as loud, as any that we have already attended to. Nor is the remedy a whit more difficult to find or to apply than it has been on some other recent occasions. We have now the prospect of seeing the gates of the Court of Chancery opened to admit the poorer suitors. Noble lords and commoners, as well lay as learned, are out-bidding each other with plans to facilitate the transfer of property; and on these subjects we are satisfied that justice will be done if the proper mode of rendering it can be discovered by the wit of man. Let us not,

¹ Queen's Regulations, &c., Parag. 3. p. 225.

therefore, be deterred by some difficulties which beset the subject we are now desirous of approaching. As in war there are many strongholds which look unassailable, but which yield at discretion on the trenches being opened; so there are many solemn mysteries which fall at once on being attacked, or fairly exposed to observation. Of this kind we are persuaded is the present system of law reporting.

Another reason urges us on to this undertaking. It has hitherto been our duty, "regardless of sacrifice," to enter into many inquiries which may lead—at all events in the opinion of some—to the injury of the temporary interests of the profession. We have never hesitated, on this ground, to pursue the inquiry; but it is far more agreeable to further a change which not only tends to improve the law as a science, but which will relieve the working professional man from a heavy burden.

There is another motive which leads us to the full and repeated consideration of this subject. In most other reforms, the aid of some important bodies out of the profession is essential: Queen, Lords, and Commons—or, at all events, some department of the Government—must usually be made to give their aid or consent, and the Parliament, in the latter case, to ratify it; but here it is the profession alone that can and must work out the change, and almost every member of it may assist. What lawyer is there who does not, in some way, help to contribute to the present system of law reporting? All professional men read, cite, quote law reports and other law books more or less, and almost all buy them more or less. The young attorney, perhaps, contents himself with a copy of the *Jurist* or *Law Journal*,—both accurate and useful collections of cases; the young barrister takes in at least one set of reports, according to his Bar—usually more; but all men in practice, or wishing to be considered as such—nay, even most pupils and articled clerks, take in some reports beyond those contained in the newspapers, not the least valuable. Now all and each of these individuals may assist in accomplishing the necessary change, and it must, in fact, to be effectual, be worked out by the mass of the profession. They now bear the greater part of the burden, and they

must relieve themselves from it, and we are persuaded they will do so when they have the opportunity given them.

Let us then, with this assurance, look only at the good prospect of success, and proceed with the conviction that we live in an age when, if we are right in our views, they must make progress, and that, sooner or later, we shall establish our point.

Having said thus much by way of introduction, we shall now place the report of the Law Amendment Society on this subject before our readers.

SPECIAL COMMITTEE.

The following reference was made to a Special Committee:—

“To consider what improvements, if any, may be made in the present system of reporting, and generally in the mode of publication of law books.”

REPORT.

YOUR Committee have considered the two subjects submitted to them, and are of opinion that the present system of *law reporting* and *law book publication* are both capable of great improvement.

The evils arising from the present systems appear to the Committee to be of a very serious nature; and it affords some degree of satisfaction to them to find that the remedies which seem the most practicable are not calculated to produce commensurate injury to any parties interested.

Considering the subject of law reporting to be of a more urgent nature than the other branch of the present reference, your Committee have been induced to make a separate Report thereon, reserving the general question of publishing law books for a future report.

The judicial decisions of the Superior Courts at Westminster, as reported in the volumes recognised by the Courts, constitute at the present day, almost equally with the statute book, *the law of the land*.

They are, to use the language of Sir Matthew Hale¹, "the formal constituents of the common law;" and yet, by a singular inconsistency, whilst every act of parliament requires the sanction of the three estates of the realm, and its contents are communicated to the public in the most authentic form, the law laid down by our tribunals is in no respect *officially* promulgated. A statute creating the most trifling alteration in legal procedure is ushered into public notice in the most formal manner possible; a judicial exposition of one of the leading principles of our common law, materially affecting the future administration of justice, the rights of property, or the liberty of the subject, may take place without notice and without anticipation, amidst an inattentive crowd, whilst the voice of the Judge who delivers it may not reach any one beyond the parties immediately interested in the case which gives rise to it.

This remarkable inconsistency is productive of greater inconvenience at the present day than at any previous period. The concurrent jurisdiction of the Superior Courts; the establishment of local tribunals; the extensive jurisdiction of the Quarter Sessions; and other courts remote from Westminster Hall, render it indispensable, in order to secure uniformity in the administration of justice, that the reports of the judicial exposition of the law at the fountain head, should be accurately and expeditiously published, and in such a form as to secure their being generally accessible to all who are either officially or professionally engaged in administering it.

The anomalies connected with the system of law reporting have become especially conspicuous in modern times. The legal decisions which, in more remote ages, seem to have been preserved in the memory of official recorders², we know were in this country, during many reigns, promulgated by officers of the Courts in an authentic form. The growth of our reporting system is thus described by the two great commentators on the laws of England.

¹ C. L., c. 4. p. 139., ed. by Runninton.

² See an article on this subject in the "Edinburgh Review" for August, 1820, title, *Laws of the Scandinavians*.

Lord Coke observes¹ —

“Of ancient time, in judgments at the Common Law, in cases of difficulties, either criminal or civil, the reasons and causes of the judgment were set down in the Record; and so it continued in the reigns of Edward I. and most part of Edward II.: and then there was no need of Reports. But in the reign of Edward III. (when the law was in his height), the causes and reasons of judgments, in respect of the multitude of them, are not set down in the Record; but then the great casuists and reporters of cases (*certain grave and sad men*), published the cases and the reasons and causes of the judgments and resolutions which, from the beginning of the reign of Edward III. and since, we have in print.”

Sir William Blackstone's remarks on the system of reporting in his time are of a less favourable nature: — “The Reports are extant in a regular series from the reign of King Edward the Second inclusive; and from his time to that of Henry the Eighth, were taken by the prothonotaries or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the denomination of the *Year Books*. And it is much to be wished that this beneficial custom had, under proper regulation, been continued to this day: for though King James the First, at the instance of Lord Bacon, appointed two reporters, with a handsome stipend, for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands, who, *sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination.*”²

Many subsequent writers³ have denounced our system of

¹ 4 Inst. p. 4.

² 1 Bl. Com., 71, 72.

³ “The number of reporters, and the manner in which many cases are reported, are most serious evils, — evils which cannot be too much lamented, nor sufficiently exposed. The contradictory statements of the same case, the confounding the arguments, nay, assertions of the counsel, with the decisions of the Courts, the *obiter* and extra-judicial sayings of the Judges with the grounds of the judgment, the observations of the reporter with the points of the case, call aloud for the nicest and severest discrimination.” — *Watkins' Principles of Conveyancing*, Introduction, p. xiii.

law reporting, and the seventy years which have elapsed since Sir William Blackstone wrote, have added to, rather than diminished, some of the evils he points out, for though in respect of accuracy, completeness, and skill, the reporters of the present day have cured many of the faults of their predecessors, yet from the vast increase of new questions of law and practice which at the present day annually arise in our courts, and the great inducements which thence arise for comprehensive reports, a new evil has grown up, unknown in the days of the learned commentator,—that the reports of the decided cases in any year for one term in any of the Superior Courts at the present day exceed, in bulk, those of all the tribunals in the country for the whole year at the period alluded to.¹ Competition, ordinarily productive of so much

¹ The following statistics of the Reports may not be devoid of interest.

COMMON LAW.

Reporter.	Court.	Date.	No. of Vols.	Average of Pages to a Report.	Average of Cases in Volume.
Croke -	K. B. & C. P.	24 Eliz. to 16 Car. I.	4	1.18	450
Lord Raymond -	—	W. III. to Geo. II.	2	1.34	597*
Salkeld -	—	1 W. III to Anne	3	1.83	266*
Sir W. Blackstone	—	1745 to 1779	2	1.8	307
Burrows -	K. B.	1756—1770	5	3.8	153
Douglas -	—	1779—1785	4	2.7	152
East -	—	1800—1812	16	4.3	108
Maule & Selwyn	—	1813—1817	6	4.78	117
Barn. & Ald. -	—	1817—1822	5	4.79	150
Barn. & Cres. -	—	1822—1831	10	4.95	175
Barn. & Ad. -	—	1831—1834	5	6	169
Ad. & Ellis -	—	1834—1841	11	6.45	152
Ditto N. S. -	—	1841—1848	8	7.75	131
Henry Blackstone	C. P.	1788—1796	2	3.9	170
Bosanquet & Fuller -	—	1804—1807	3	4	100
Broderip & Bing.	—	1820—1822	3	6.9	156
Bingham -	—	1822—1834	9	4.5	172
Ditto N. C. -	—	1834—1840	6	4.4	142
Scott -	—	1835—1845	16	7.6	114
Manning, Grain-ger, and Scott -	—	1845—1848	3	9.6	101
Price -	Exch.	1814—1825	13	8.6	77
Crompton, &c. -	—	1831—1836	6	4.79	141
Meeson and Welsby -	—	1836—1847	15	6.65	129

* The Pleadings take up in Lord Raymond's Reports 361 pages, and in Salke'd 100 pages additional.

good, in this instance adds to the evil. The higher class of reports, which really are or ought to be the records of the existing law, are made as elaborate as the cases will admit of. The whole of the written pleadings, the documentary evidence, the speeches and arguments of counsel, with the various authorities cited on each side, are often given even in cases where the actual decision of the courts really expounds no new doctrine of law, or is confined to some isolated point.

EQUITY.

Reporter.	Court.	Date.	No. of Vols.	Average of Pages to a Report.	Average of Cases in a Volume.
Peere Williams -	L. C. & Rolls	1695 to 1735	3	3·85	200
Ambler - - -	—	1737—1778	2	2·49	171
Atkins - - -	—	1736—1754	3	2·79	286
Vesey, jun. - -	—	1789—1812	19	5·33	128
Vesey & Beames -	—	1813—1814	3	4·6	82
Merivale - - -	—	1815—1817	3	7·4	91
Swanston - - -	—	1818—1820	3	6·5	92
Jacob and Walker -	—	1819—1821	2	7·3	91
Jacob - - - -	—	1821—1822	1	5·2	121
Russell - - - -	—	1823—1829	5	6·1	97
Mylne & Keen - -	—	1832—1835	3	8·1	87
Mylne & Craig -	Chancery -	1835—1841	5	10	72
Phillips - - - -	—	1841—1847	1	7	115
Keen - - - - -	Rolls - - -	1836—1839	2	8·5	96
Beavan - - - -	—	1839—1847	9	4·9	124
Maddock - - - -	V. C. of E.	1817—1826	6	4·9	104
Simons - - - -	—	1826—1847	15	6·2	102
Young & Coll. -	V. C. K. B.	1841—1844	2	7·1	98
Hare - - - - -	V. C. Wigram	1841—1847	5	7·3	85
Schoales & Lef. -	Irish - - -	1802—1806	2	9·7	62
Rose - - - - -	Bankruptcy	1810—1816	2	1·6	290
Mont. & Ayslop -	—	1834—1838	3	3·7	213

Dalloz. Recueil Periodique et Critique de Jurisprudence, par M. Dalloz aîné et M. Armand Dalloz, son frère.

	Year.	Cases.	Pages.	Average Length of Report.	Total Average.
Cases computed - -	1846	1408	524	·37	·42
—	1845	1570	613	·39	
—	1844	1372	640	·46	
—	1843	1428	712	·49	

N. B. The pages are double quarto, and the type rather small.

The time which is necessary to effect this, often prevents the decisions of our tribunals being communicated to the public until long after they have been given, and after suitors have taken a course in direct but unconscious opposition to them, and occasionally, even after other judges have unknowingly pronounced directly conflicting decisions. The bulk and expense too of these reports render their contents inaccessible to the great majority of those who are officially or professionally expected to be acquainted with them, and the supply of rival productions simply adds to the cost without diminishing the inconvenience.

It has long been considered a practicable scheme for any barrister and bookseller who unite together with a view to notoriety or profit, to add to the existing list of Law Reports. It may be that such reports may be rarely referred to, that they may be inaccurate, that they may be of little or no authority, — they nevertheless remain. They tend to confuse the science; they muddy the stream and bring on, more especially in some after age, all the evils described by Blackstone. A case of great importance¹ was decided a few years ago upon the authority of a note in Lofft's Reports², which one of the learned Judges observed, with some bitterness, he had never heard three cases quoted from during a professional life of forty years³; and some of the inferior law reports of the present day may, perhaps, meet a similar fate. But even if all the reports which are published were correct and given by competent persons, they are now so numerous that they cannot be known to one tithe of the practitioners in the law. They are beyond the reach, not only of the public, but of the great body of the profession. Indeed, it is not too much to say that few of the Judges or the bar (and hardly any of the solicitors) take in all the current reports. Wherever there is the smallest opening, the profitable trade of law bookselling establishes a fresh series of reports. In each of the Common Law Courts, it is true the rival series

¹ *Smith v. Doe dem Jersey*, 1 B. & B., 97.; 2 B. & B., 536.

² *Hottley v. Scott*, Lofft, 316.

³ *Observations of Park, J.*, 2 B. & B., 536.

of reports which have been recently the longest established have been amalgamated; but long before this point was gained numerous series of reports had been set on foot, professedly confined to *practice cases, criminal cases, sessions' cases, registration cases, railway cases, parliamentary cases, &c.*, but containing reports of decisions vouched as correct by barristers, whose accuracy must, under the existing system, be assumed.

The competition of the reporting system is thus carried on without regard to the interests of the profession or public. The gentlemen who undertake these reports are often highly competent men; indeed, many of them have been raised to the Bench of Westminster Hall. Independent of the profit of reporting, it is a good channel to professional notoriety; but here is one great evil of the system. If the reporter has other professional engagements, he loses his anxiety about his reports, he throws up his office when he pleases (and cannot be blamed for this), and it has been held that the bookseller cannot compel him to perform it. Thus we have chasms in our law reports, which will occur readily to any professional reader, which can never be supplied. It is well known that an eminent counsel (formerly a reporter) practising at the Chancery Bar, has at the present moment notes of the decisions of a deceased Lord Chancellor, taken by the learned counsel in his character of reporter, but to this time unknown as law to all the profession save the parties engaged in these causes. In the preface to a work recently published by a late Lord Chancellor of Ireland¹, it is observed, "whilst at the bar, the author retained all the printed cases on appeals in which he was counsel, with his own notes and the notes of the argument. From this source, principally, he has been enabled to add the cases not at present reported between 1821 and 1826."

Thus, under the present system of reporting, the law expounded in Westminster Hall may not only remain for years concealed from the public, but the professed reporter himself, or the counsel in the case, may alone be in possession of the decisions, at the risk of their being used at any moment to

¹ Sugden's *Law of Property*, preface, p. 4.

contradict the law as universally received amongst the Profession.

This inconvenience is thus alluded to in the preface to Watkins' *Principles of Conveyancing*:—"Supposing that a person should be so fortunate as to be able to extract something comprehensible out of printed contradictions, yet other contradictions may make their appearance in manuscript, and, overthrowing all his hard-earned knowledge, remind him once again of *the glorious uncertainty of the law*. Is the law of England to depend upon the private note of an individual and to which an individual can only have access? Is a judge to say, 'Lo! I have the law of England on this point in my pocket: there is a note of the case which contains an exact statement of the whole facts, and the decision of my Lord A. or my Lord B. upon them. He was a great, a very great man: I am bound by his decision: all you have been reading was erroneous. The printed books are inaccurate;—I cannot go into principle. The point is settled by this case?' Under such circumstances, who is to know when he is right or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private *memoranda*, who can hope to become acquainted with the laws of England?—and who that retains any portion of rationality would waste his time and his talents in so fruitless an attempt? Is a paper evidencing the law of England to be buttoned up in the side pocket of a judge, or to serve for a mouse to sit upon in the dusty corner of a private library? If the law of England is to be deduced from adjudged cases, let the reports of those adjudged cases be *certain, known, and authenticated*."

The inconvenience arising from the sudden retiring of law reporters has been already noticed; the present system, however, enables, and indeed induces, the publisher of a series of Reports, on finding them at any time not sufficiently remunerative, to stop the supply, and leave the notes already collected to serve the purpose which is thus reprehended; and hence the cause of those long intervals in the reports of some of the Courts.

The reporter, however, under the present system may

unavoidably be absent, or purposely omit cases which he deems not to be authorities; and we have heard of an eminent Nisi Prius reporter preserving in MS. a whole pile of decisions of a late Chief Justice which he deemed *bad law*.

The evils, too, arising from the *inaccuracy* of some of the existing reports are often practically felt by the profession. In an article on this subject in the *Law Review* of February, 1848, a long list of instances (taken from the then last numbers of the several Reports) is given, where cases solemnly cited and relied on in argument, were denounced as *incorrectly, inaccurately, or falsely* reported; and it is a common thing to hear of a particular Report or set of Reports, that they are *not of much authority*. Hence the suitor, even after he has discovered what the law is reported to be, may find to his cost that such Report, however authentic in appearance, is inaccurate.

It is but little consolation to say, on the trial of a cause, "That case is not law," after it has misled half the kingdom.¹

The Committee do not wish to say any thing in this place as to the present style of law reporting; still it will hardly be denied, that with few exceptions the volumes of Reports are commonly too verbose, and too open to the reproach of *book-making*. In a useful article on Law Reports in a recent number of the *Law Magazine*², a reform of the existing style of law reporting is warmly advocated. "Instead of a collection of judicial decisions," it is observed, "with the facts necessary to support them, and the grounds upon which they are made, carefully and briefly set out, we have volumes upon volumes of reported cases, in which the points important to be known bear but a small proportion to the mass of useless undigested matter with which these volumes are filled. The inconveniences of such a system are evident: instead of having to read through a few pages, and at once obtaining a clear comprehension of a particular point, we have to wade through an enormous quantity of matter, which, so

¹ Preface to Watkins' Conveyancing, p. 21., note 10.

² No. 16, N. S., art. 1. p. 1., Aug. 1848.

far from throwing additional light upon the subject, confuses by the numerous doubts and difficulties by which each case is surrounded; the consequence is, we do not obtain that certainty in the law which it should be the object of Reports to accomplish."

To sum up in a few words the evils and inconveniences of the existing system of law reporting, there is no guarantee afforded to the public, that the judicial exposition of the law will be reported at all, or reported correctly — or in time to prevent mistakes — or in such a manner, with respect to conciseness, form, and price, as to be accessible to those whom it so vitally affects.

Whilst these various evils of the present system have forced themselves upon the attention of your Committee, they have been much struck by the fact, that the present voluntary outlay of labour, skill, and money on the part of the legal profession in the shape of law reports, are amply sufficient to secure, under a systematic direction, all that could be desired in the shape of an authentic series of reports to be produced regularly, expeditiously, and cheaply.

There are at this moment upwards of forty barristers of acknowledged skill constantly employed in the preparation of what are deemed the *regular Reports* of the decisions in the Courts of Westminster Hall, the House of Lords, &c., and it is believed there are an equal number of members of the Bar occupied in reporting for the various weekly *legal periodicals*, &c., or occasionally assisting the class first alluded to; and among these additional reporters are many of considerable skill and legal acquirements.

The present expense of a complete set of the Reports for the current year — exclusive of the ephemeral publications, the reports of the Courts at Doctors' Commons, and the various classified reports enumerated before, as magistrates' cases, railway cases, election cases, &c. — amounts to the sum of 30*l.*; and estimating the present average circulation

¹ Viz., the three series of Common Law Reports; the Law Journal; the Chancery Reports; the House of Lords Reports; the Nisi Prius Reports; and the Practice Reports.

of these books at 750, it is obvious that the annual outlay to the Profession, in purchasing them, amounts to about 22,500*l.*; and if to this sum be added also the outlay of the Profession in the reports of less circulation, as the Courts at Doctors' Commons, Irish reports, election reports, magistrates' cases, &c., and the weekly periodicals, it is plain that the expense comes to many thousands more. It would seem that not more than 9000*l.* is paid to the reporters themselves, and the remainder is carried to the account of the expenses of printing and the profits of the publishers and booksellers.

The high price of law books has for years been a common subject of complaint; and when it is considered what a small proportion of this price goes into the pocket of the author or compiler, it is remarkable that the Profession, who are at once the producers and consumers, should have never yet attempted a remedy.

The commission allowances, &c., to the *trade* on the sale of books generally amount to between 30 and 40 per cent., and sometimes even more, on the cost of a book.* Thus on a book of Law Reports, on which the smallest allowance is made, if the money is to be accounted for to the author, first of all 20 per cent. on 2*l.*, its nominal price, is allowed to the retail bookseller; 5 per cent. more, and one copy in twenty-five, in all 9 per cent., or 3*s.* 8*d.*, to the wholesale bookseller; and 7½ per cent. at least, or 3*s.*, by way of commission to printing and advertisement expenses and the publisher; only 1*l.* 5*s.* 4*d.* being left for the remuneration of the author. Hence it obviously requires a sale of 400 copies of such a

¹ Mr. Babbage, in his "Economy of Manufactures," estimates the share of profits derived by the trade from books sold on an author's own account as fifty-four per cent. (p. 261.) A less allowance, however, is usual in the law book trade. This allowance we believe to be as follows:—To the retail dealer 20 per cent. on Reports and 25 on other books; to the wholesale bookseller 5 per cent. more, and also 1 copy in 25, or 9 per cent.; and to the publisher between 7½ and 10 per cent. for commission. The principal law publishers have very recently entered into an arrangement to refuse allowing any booksellers besides themselves more than 10 per cent. on retail sales; but it by no means follows that this deduction is discontinued. In the authors' accounts all sales are still credited as made to the principal law booksellers, and at the whole-sale trade prices.

work to save the proprietor of the copyright from positive loss; and the publishers, relying on this, generally succeed in getting the copyrights of the Reports into their own hands.

If in any case a society for the purpose of publishing books were practicable, it would seem most peculiarly so among the legal profession.

The "Law List" of the present year contains the names of about 14,000 practising Barristers, Attorneys, and Solicitors, and this list would be vastly increased by an addition of the local and colonial Judges, Magistrates, and Law Officers, and the crowd of students, articled clerks, &c. preparing themselves for the profession.

To the majority of this numerous class the serious expense of the Law Reports in their present shape is the principal objection which prevents their being used.

Now, if instead of the limited average circulation on which the above calculations are formed, the reports were generally circulated amongst the Profession — the majority of them, say, for the sake of round numbers, 10,000 — annually contributing to a fund for the purpose a sum less than it may be assumed they have at present annually to lay out, it is pretty clear that, instead of 30*l.*, the small annual sum of *three pounds* would be amply sufficient to secure to each of the contributors a supply of all the reports even in their present form: a fact which may be easily rendered intelligible.

The printing and binding of 1000 copies of an ordinary octavo volume of Law Reports, of even 800 pages, costs about 330*l.*, and every additional 1000 copies about 160*l.*; and thus 10,000 copies of such a work can be produced for about 1760*l.*: and if the expenses of ten series of Reports, at this rate, be added to the sum already estimated as the amount of the reporters' present remuneration, it will be found that the whole expense of a set of Reports for each Court, as voluminous as they are at present, would leave a large surplus from the amount of the small annual contribution suggested.

By a recent regulation in the House of Lords, in accordance with the practice in France and the United States of America, law reporters are, at this day, officially appointed.

In the American Courts, the reporters, both in salary and rank, come next after the Attorney-General of the State.

The general restoration of the old system of official reporters in our Courts has been often advocated. Our Law Reports would thus be stamped with some degree of authority, and the unseemly competition in the avocation of *book-making*, which the present system engenders, would be got rid of. However this may be, it seems to your Committee, that were any plan actually in force for the Profession having the direct control over the publication of the Reports, many other advantages than mere economy would be gained. The division of labour between the reporters, when so large a number as that which we have assumed are employed—and the system and regularity which this would create—would go far to put an end to many of the evils which at present exist in law reporting. The quality and not the quantity of the material would be more studied; and the omission of a really important decision would be deemed as serious a neglect in the reporter as an inaccurate report of it.

So far the report on this branch of the subject, which we admit is the most important and most generally interesting; but there is another portion which we must not entirely neglect. There are many law books and legal publications besides law reports. Let us see whether full justice is done to them by the present mode of publication. This is also a question of the greatest interest and importance to all classes of the profession. The channels of legal information should be kept open and unobstructed; the stream of the science of the Law should run free; the utmost encouragement should be given to the publication of law books of every description. They are the air we breathe; without law, and good law, and cheap law, we die. We venerate the race of legal authors; it must be kept up—supported, and the most ample encouragement should be given to it that the nature of the case affords. The supply is large, the demand must be limited. Let us see how this part of the subject now stands. It is explained in a second Report of the Committee of the Law Amendment Society on the same reference:—

SPECIAL COMMITTEE.

THE following reference was made to this Committee : —

“ To consider what improvements, if any, may be made in the present system of Law Reporting, and generally on the mode of Publication of Law Works.”

REPORT.

Your Committee, in entering on the investigation of the second branch of the subject referred to them — the mode of publication of law works, — have considered it advisable to direct the attention of the Society to the various modes in which law books are now usually published in this country, and to point out the alterations in the system which appear to them the most likely to afford encouragement to the production of works of permanent value, and generally to promote the pursuit of this department of literature.

They think it is of the utmost importance that the channels for legal information should be kept open and free, and that the least embarrassment possible that the nature of the case allows should exist in the publication of all works connected with the science of the Law. There should always be a trustworthy hand ready to receive these productions, and an account of their proceeds should be rendered accurately and speedily.

The alternative which has usually presented itself to the author of a new legal work, in order to get it printed and published, is either to take the risk on himself or to sell his copyright to an established publisher, whose connections and facilities for advertising and publishing his works afford a greater probability of each work entrusted to him being brought into circulation. Of late years, a middle course, also, has been much adopted by the publishers towards a new author, viz., to arrange for the publisher taking the whole risk, and dividing the net balance of profits, after deducting his charges and expenses.

The profits of a work, however, which fall to an author who does not absolutely sell his copyright to a publisher, are

not the clear produce of his book after payment of its expense of printing, advertising, &c. &c., but the amount only of that portion of the price of each copy which is not, by the usage of the book trade, appropriated amongst the booksellers and publishers. In no case is as much as two-thirds credited to the account of printing and authorship. Without entering into minute details, it may be stated that more than a third is invariably apportioned in the shape of allowances, &c. to the book trade, and the expenses of publication. It is hardly necessary to add that if a work is published on the terms of "*half profits*," the author's share must at least be reduced in proportion.

Your Committee do not deem it necessary to enter into a history of this scale of allowances which the usages of the book trade thus establish in the case of ordinary publications. Whether these allowances originally attached only on copies remaining in a publisher's hands after (as was formerly the common practice) the work had been formally subscribed for, or whether they were permitted by way of compensation for the heavy expenses booksellers formerly incurred by way of carriage, &c., or some risk which they do not now incur, does not distinctly appear, but certain it is that these deductions, together with the anxiety and annoyance attending the superintendence of publications, and the unprotected state in which an author is left as regards his accounts, have at present the effect of offering considerable discouragement to authors in any case becoming their own publishers.

In the case of works of a popular character, the circulation of which is likely to be extensive, and in the sale of which the services of many hundred booksellers may in all probability be engaged, the allowance of so large a portion of the price of books to the trade, and the effect of the system in confining the business of publishing entirely to booksellers, may perhaps not be productive of any great practical inconvenience. The great publishers in catering for the public taste often incur very serious losses, and seem therefore justly entitled to commensurate gains; but in the instance of publications of a purely professional character, the uniform

operation of the present publishing system is much more directly injurious.

The members of the legal profession, for instance, constitute a class who, more peculiarly than any other, require a supply of new works of reference. The class includes exclusively amongst their members the authors and readers—the producers and consumers. The practice might not be quite convenient for the author of a new work of this kind to become his own bookseller, although from the imprint in a law book of great value¹, such a practice seems formerly not to have been deemed unworthy of a member of the English Bar, and a man of honourable feelings; but it has appeared to your Committee an inconvenience of a very serious nature that in such a profession a volume produced by one member cannot pass into the hands of another without a trade allowance, &c. attaching of frequently more than 35% per cent. on its actual price; and your Committee far more deplore the consequences to this branch of literature of a system which, by preventing authors, except at very heavy risk, and frequently much trouble and uncertainty, becoming their own publishers, leave the selection of subjects and authors to booksellers.

In making these observations, your Committee have no wish to impute any improper motives or untradesmanlike conduct to the class of booksellers who usually undertake the publication of law books. They only desire to pursue the inquiry they have been requested to make with a wish to see if any better mode of publication can be established for the benefit of legal literature, the profession, and the public. The most effectual reformers of any abuse or inconvenience

¹ “A General Abridgement of Law and Equity, alphabetically digested under proper Titles. With Notes and references to the whole. By Charles Viner, Esq. Aldershot in Hampshire, near Farnham in Surrey. Printed for the Author, by Agreement with the Law Patentees, and are to be sold by George Strahan in Cornhill, or may be had of the Author at his Chambers No. 3. in the King's Bench Walk, Inner Temple; or, in his Absence, of William Reason, bookbinder, in Flower-de-Luce Court, in Fleet Street. London, 1746.”

that now exists, either in the present system of law reporting or of other legal publications, would be the law booksellers themselves; and if your Committee had any idea that they would themselves undertake the task, your Committee would gladly resign it into their hands, as at once the best and easiest mode of effecting the proper amendments.

But giving this all due consideration, they pursue the present inquiry. At this time any legal subject would readily find a bookmaker if it offered sufficient prospect of an immediate return to remunerate the bookseller; and no treatise, however intrinsically valuable for the learning, research, style, or arrangement of its contents, would find a publisher to risk the expenses of publication upon it, unless this immediate return appeared very probable; and hence it comes to pass that whilst the speedy publication of a new statute, a set of rules of court with notes written at the moment, a new version of an old book of practice, or an index of cases, creates an eager rivalry amongst the publishers, productions of a scientific or elaborate character rarely appear.

Your Committee have great reason to believe that it is to the prevailing mode of publishing, and the discouragement it presents to the production of works on the science and principles of jurisprudence, that these circumstances are to be attributed. There are not wanting in the profession of the law at the present day men as industrious, zealous, learned, and, in other respects, as competent to the task of writing well, as at any former period, if the same proper encouragement were afforded.

The bookseller is, however, now the only caterer for the profession; and the more ephemeral the publications he deals in, the less they cost him, and the more speedy and frequent will be his gains. It is scarcely to be expected, at the present day, that law booksellers should venture their money in the publication of works which it would require an accomplished jurist properly to appreciate; but it does not follow, because the booksellers will not undertake such works, that members of the profession are to be practically precluded from doing so.

The task of publishing valuable works not calculated for popular sale has in various instances been undertaken by *societies*. Works on divinity, various departments of science, antiquities, &c., have been undertaken by the Parker, Linnean, Camden, and other similar societies; and it appears to your Committee that the honorary exertions of a voluntary society might, in the legal profession, effect a great deal more than is done by any of the societies alluded to — for, by merely insuring proper protection to authors, they would encourage the publication of many legal works of a high class, which, under the present system, are seldom published.

Under the auspices of a Society of this nature, also, the publication of many works of great practical use to the profession might be reasonably anticipated and brought about. Those members of the profession who had both the leisure, the will, and the power to assist, might thus easily be brought into terms of friendly co-operation, and the results of this combination might develop themselves in the production of a law dictionary or cyclopædia, or perhaps a new general abridgment of the law. This work seems rendered necessary by the great changes in the law made in the present century, and its price, under such an arrangement, might be such as to render it from its circulation highly remunerative to the authors of the articles, but within the reach of every member of the legal profession.

A Society composed even of a moderate number of gentlemen of the legal profession, whether or not they were authors themselves, contributing a small annual subscription, would be fully equal to effect a change in the mode at present adopted in the publication of Law Works and Law Reports. They would at all events secure one great point in favour of the production of works of intrinsic value, for by obtaining for the author what he cannot under the present system obtain, an equal chance of circulation for a work published at his own risk, and thus providing an adequate remuneration for himself, the avocation of bookmaking and the trade of bookselling might be made secondary and subservient to the art of good authorship.

The proposed Society might, by undertaking the task of properly advertising, publishing, and superintending, by competent agents, the sale of works printed by authors at their own risk, ensure to the author — what the present system of publication unfortunately does not — a fair share of what the public actually pay for his work ; and such a Society would most unquestionably succeed in giving satisfaction on one material point where complaints on the part of authors are now very general ; for by a systematic attention to the subject of accounts, the author would always be enabled to ascertain how his work stood, and to learn a number of other particulars in respect of which the author is now too often left in the dark. Indeed, there seems no reason why in this respect the accounts respecting a book might not stand as subject to inspection, and as capable of being rendered and checked at regular intervals, as an account with a banker.

A Society, indeed, of this description would be self-supporting. A small per centage on sales of books published by means of the Society would easily suffice to defray the whole expenses of a competent establishment. The existing allowances, &c. might be suffered to continue with respect to works purchased of the Society's agent by booksellers ; but copies sold to other persons would be credited to the author at the price actually obtained for them, reasonable allowances being made to all parties purchasing directly of the agent ; a still greater allowance being given to members on works subscribed for before publication, and, generally, to members of the Society. It is obvious that no member of the Society, as such, should derive any benefit from the Society, except as an author, and as a purchaser of the books published by the Society. The profits made by the Society, after defraying the expense of the establishment, should go to the author of the particular work which brought them.

Whilst your Committee have been thus induced to give their approbation to the idea of the formation in the profession of a private association which might not only afford adequate protection to legal authors in publishing their own works, but might, if thought advisable, undertake the pub-

lication of Law Reports on the plan proposed in their first Report, they do not recommend that the Law Amendment Society should afford to the association any thing more than their sanction and approbation, leaving the success or failure of the plan to depend entirely on its voluntary contributors and supporters.

We do not apprehend much opposition, but, on the contrary, we expect much encouragement, in assisting to carry these reports into practical operation. But it may be said that there is a class of men connected with the profession, the law booksellers, whose interests are not sufficiently attended to in them. Now, we fear, it will be difficult to find any ground for this argument to stand on in the present day. These gentlemen must share the fate of other classes, who, having enjoyed for many years a virtual monopoly, have been obliged to resign it. We do not wish to press heavily on this class. Among them are to be found many able and excellent men. We believe it is well known that at one time, if they had been disposed to have become themselves the reformers of the system, they would have received the cordial co-operation of those gentlemen who have taken an interest in this amendment. If then they are in the slightest degree injured by any step that may be taken in consequence of these reports, they have to lay it to their own unwillingness to second an operation that might be turned into a source of great and exclusive profit to them. This is, indeed, the language and the spirit of both reports, and more especially of the latter. We need not say that we shall take a lively interest in the prosecution of this important subject.

ART. X.—MACQUEEN ON HUSBAND AND WIFE.

The Rights and Liabilities of Husband and Wife. By JOHN FRASER MACQUEEN, Esq., of Lincoln's Inn, Barrister-at-Law. London: S. Sweet, Chancery Lane; Hodges and Smith, Grafton Street, Dublin. 1849.

THE work which we have placed at the head of this article furnishes very clear evidence that its author, Mr. Macqueen, is one of that enviable class of mortals, who are "firmly persuaded," with Lawrence Sterne, "that every time a man smiles—but much more so when he laughs,—it adds something to this fragment of life." Not content with producing a legal treatise, alike profound, concise, and accurate, the learned author has endeavoured to make it readable, and even amusing; and, unless we are much mistaken, the public will agree with us in pronouncing this endeavour to have been eminently successful. In thus striving to mingle the grave and the gay, Mr. Macqueen has undoubtedly taken a bold step; for text-writers on legal subjects have so long enjoyed a prescriptive right of being dull, and so few of them have hitherto failed to exercise this right even to a lavish extent, that many worthy members of the profession are without doubt "clearly of opinion," that dulness is an indispensable ingredient, if it be not in itself the only test, of a really good law-book. Indeed, to such an extent does this pernicious error prevail, that many "a rising young barrister of forty," who occupies a back seat in Westminster Hall, and is just capable of moving to make a rule absolute, on affidavit of service, no cause shown, entertains a serious doubt whether Mr. Justice Maule and Mr. Baron Alderson can be accomplished lawyers, seeing that their jokes are apt most irreverently to set the Court in a roar. For these fastidious gentlemen, whose leading article of faith is that wit and wisdom cannot be combined, Mr. Macqueen assuredly has not written; but to those who will condescend to be entertained,

at the same time that they are instructed, his work will prove a most acceptable boon.

It is not easy to select passages to illustrate the author's gay and lively style, but the following will perhaps give the reader a fair idea of what he may expect to find interspersed in all parts of the book before us. In treating of the fourth section of the Statute of Frauds, which requires that promises and agreements in consideration of marriage shall be in writing, and signed by the party to be charged therewith, Mr. Macqueen observes:—

“ The object of this enactment is to guard against the danger of admitting parol evidence in matters very liable to be misapprehended and misconstrued, and consequently very likely to give rise to perjury and fraud. It may indeed be asked, are not these consequences just as likely to happen in the case of promises to marry? But promises to marry, as before remarked, are, in their nature, uniform and certain; whereas promises and agreements in consideration of marriage are of endless variety, and would almost, in every case, produce a conflict of oral testimony. The policy of the statute is indeed rested on a different basis, in the well-known case of *Montacute v. Maxwell*, before Lord Chancellor Macclesfield. There it was contended that the object of the clause was to protect parties from being bound by those unguarded verbal declarations which are common in courtships; ‘since in no case can there be supposed so many expressions and promises as in addresses in order to marriage, where many passages of gallantry usually occur.’ But this is somewhat lax morality, which we ought not to attribute to the legislature; for the act was made, as its preamble declares, not to promote ‘passages of gallantry,’ but to repress perjuries and frauds.”¹

With respect to actions for breach of promise of marriage it is stated:—

“ This remedy (which many think a discredit to our institutions) is not of very ancient date in the law. It seems to have been unknown to Lord C. J. Vaughan (who presided in the Court of Common Pleas from 1668 to 1674); for we find that eminent judge expressing a doubt whether *any* action could be maintained on mutual promises to marry. Such promises are not to be confounded with the ancient promise of marriage *de futuro cum*

¹ P. 226.

copula, which, as we have seen, gave ground for a suit in the Spiritual Court to compel solemnisation *in facie ecclesiæ*; for the promise *de futuro cum copula* constituted *ipsum matrimonium*; whereas a promise to marry in modern times acquires no additional force from a *copula*; and since the passing of Lord Hardwicke's act is neither in itself a marriage, nor warrants any ecclesiastical process to compel solemnisation."¹

We are then told, that "damages in Scotland (for breach of promise of marriage) are awarded as 'a solatium to injured feelings, and compensation for loss of market;'" and a little further on is the following passage:—

"It is a general rule in all contracts that both parties must be bound, or neither; therefore, where an action is brought for breach of a marriage promise, acceptance of the promise must be alleged and proved. But this acceptance may be established by circumstances. It is not necessary that it should be in words; it may be *rebus ipsis et factis*; the law making allowance for the delicacy of the female, who is commonly, though not always, the acceptor in such cases."²

Occasionally Mr. Macqueen's gaiety assumes a sarcastic tone, and in one or two places his sarcasms are directed, with somewhat dubious taste, against the judges themselves. An example of this will be found at page 60, where the case of *Hore v. Becher*, 12 Sim. 465, is discussed. There, a single woman, being entitled to an annuity for her life, secured by bond, married, and her husband executed a release of the bond, and died; whereupon Sir Lancelot Shadwell held, that the widow's claim to the future payments of the annuity for her life was barred by the husband's release. In questioning the correctness of this decision, Mr. Macqueen observes:—

"The reasoning on which this case proceeds will, to plain minds, be hard to understand; for here is a disposal by the husband of the wife's interest, beyond the coverture, although that interest was neither reduced into possession, nor, in the nature of things, capable of being reduced into possession in the husband's lifetime. The Vice-Chancellor of England draws a distinction between an assignment and a release, which does not appear to have entered into the mind of Sir Thomas Plumer in deciding

¹ P. 221.

² P. 222.

Purdew *v.* Jackson ; or into the mind of Lord Cottenham in deciding Stiffe *v.* Everitt. And even as regards a release, we have an ancient case in Moore, which determines, that ‘if the wife has an annuity for life, a release by the husband does not bind her if she survive.’ So that, on the whole, it may perhaps be doubted whether the decision in Hore *v.* Becher (even admitting it to be technically accurate), does not stand upon a refinement (I say it with reverence) too sublimated to govern safely the practical transactions of mankind. However, it may be supposed to have received something in the nature of a carefully balanced and, consequently, equivocal judicial sanction in Ashby *v.* Ashby, where Vice-Chancellor Knight Bruce, after deciding that the husband’s assignment of his wife’s chose in action was void against her surviving, observed, ‘What would have been the effect upon the wife’s rights if the husband had *bonâ fide*, for a valuable consideration, executed a deed of release of this legacy, *I do not say*.’ As the point was not raised either by the circumstances or the argument in Ashby *v.* Ashby, this judicial remark must be considered a volunteer. So, I apprehend, must likewise be held another observation of the same learned judge in Whitmarsh *v.* Robertson, where a husband having *assigned* the dividends of a fund to which his wife was entitled for her life, the report states : ‘As to the question whether the wife surviving her husband would or would not be entitled to receive the annuity, his Honour (Vice-Chancellor Knight Bruce) declined to give any opinion.’ Now this was the very question decided by Lord Cottenham in Stiffe *v.* Everitt. So that, although the Vice-Chancellor ‘declined to *give* an opinion,’ we are bound to suppose that he *had* an opinion, and to conclude, likewise (in the absence of proof to the contrary), that that opinion was in conformity with the Chancellor’s decision.”

The author then adds in a note :—

“ *Obiter dicta* of judges are of value when they affirm anything, or deny anything ; that is to say, when the judges *commit* themselves to a positive proposition : mere disclaimers of opinion, on the other hand, are often dangerous, since they may be construed into doubts where perhaps no doubts exist.”

Now we cannot help thinking that these strictures, however justly deserved, might conveniently have been conveyed in more becoming language ; for it is an old-fashioned, though not the less wise rule, that the ermine of the Judge should

not be handled roughly, but that those who sit in high places should be treated at least with outward respect.

Having given these few examples of what may properly be termed our author's "merry conceits," we proceed to point out shortly what the work does, and what it does not, contain. The title-page affords no very precise information on this head, for the book is there stated to be a treatise on "The Rights and Liabilities of Husband and Wife, comprising, 1. The Contract of Marriage; 2. The Rules of Property thence arising; 3. The Wife's Debts, Equities, and Necessaries; 4. The Husband's Powers and Responsibilities; 5. Marriage Settlements; 6. Separate Use; 7. Deeds of Separation; 8. Custody of Children; 9. Divorce; 10. Practice on Acknowledgments of Deeds by Married Women." The author, indeed, further tells us in his preface, that "questions of conveyancing and pleading are touched upon but lightly, because these are more ably dealt with by writers whose books are necessarily in every hand;" and he adds, in his introductory chapter¹, "that the validity or invalidity of the marriage contract, involving topics of ecclesiastical jurisdiction, will not be discussed in the following pages; the objects of which are limited to a practical inquiry into the effects of the contract (assumed to be valid) upon *property*." Taking these scattered intimations together, the reader will readily observe that the work is by no means a general treatise on the Law of Marriage, and on the rights and liabilities arising therefrom, and he must consequently not expect to find in it one word of explanation as to how far the husband and wife can be admissible as witnesses for or against each other; how far the wife is responsible for offences committed by her in the presence of her husband, or how far the marriage contract is affected by the doctrines of international law. In fact, Mr. Macqueen has merely undertaken to expound the rules of property which arise from the relation of husband and wife; and even in this limited inquiry he has made, either designedly or by mistake, several important omissions. For instance, we cannot collect from his work,

¹ P. 13.

what is the effect of marriage on the wife's copyhold estate—what is the operation of the important act of 11 Geo. 4, and 1 Will. 4, c. 65, or in what cases a wife is empowered to make a will.

It must be acknowledged that the omissions just referred to detract, to a certain extent, from the general utility of the work; but it is only just to Mr. Macqueen to state, that the points which he *has* undertaken to elucidate, have been *thoroughly explained* by him, and that these points will be found to embrace most of the important topics which peculiarly belong to the Law of Marriage, as considered in connection with the law of property. Not content with merely collecting the cases, which is comparatively an easy task, he has, as he truly states in the preface, not always thought himself at liberty to give decisions without commentary: and it is in this that the chief merit of his work consists. The *scissors* have not been once used; but every line of every page has been actually *written*. Each rule of law, as it arises for discussion, is expressed in precise language; the mode, and often the period, in which it was introduced is stated, and the principles on which it rests are explained. The leading cases which illustrate its operation are then referred to, and those decisions, if any, which appear inconsistent with it, are canvassed and condemned. It may be, that the author has on one or two occasions advanced propositions, or raised objections, to the accuracy or force of which the profession will not assent; but he has always given "a reason for the faith that is in him," and is therefore little likely to mislead. Indeed, his object seems to have been to put his readers on their inquiry, and by inducing an exercise of thought, to fix legal principles in the reason as well as in the memory.

The most elaborate chapters in the work are those which treat of the wife's equity to a settlement, of dower, of divorce, and of the separate use. This last chapter deserves especial notice, as containing a most masterly exposition of a very difficult, but no less interesting, branch of the law. With respect to the establishment of the separate use by the Courts of Equity, Mr. Macqueen observes:—

"I shall not here attempt an antiquarian review of this remarkable creation. Obscure and doubtful indications of it are discernible so early as the reign of Queen Elizabeth. It seems to have been plainly recognised by Lord Nottingham, Lord Somers, and Lord Cowper. In Lord Hardwicke's time it was perfectly established; but it was not fortified and made secure till Lord Thurlow sanctioned the *clause against anticipation*; whereby the wife, for whose benefit this fabric has been reared, is precluded from destroying it."¹

The object, use, and effect of this restraint upon anticipation is afterwards thus luminously explained:—

"The wife, as we have seen, had not only the privilege of enjoying, but the unrestrained freedom of alienating, her separate property. With a perfect liberty of disposal, this inconvenience arose: she was still open to the operation of her husband's personal influence; and might be persuaded to part with, or to charge, her separate property, even against her better judgment. Cases constantly occurred in which, yielding to his authority, or complying with his entreaties, she defeated the provision intended for her; insomuch that the mere limiting of property in this manner proved often a futile operation, and the separate use was in danger, except where the wife had great firmness, of becoming little more than a name; until Lord Thurlow, in *Miss Watson's case*, gave sanction to the salutary clause which restrains anticipation, and takes from the wife the power of bringing ruin upon herself. By this clause, the separate use is not only made secure and indefeasible, but is further prevented from becoming (what it otherwise might be) the cause of matrimonial contention; for the husband, knowing that his wife's hands are tied up, forbears to urge impossibilities. In every point of view, therefore, this clause deserves the commendation which the wise have bestowed upon it."²

The chapter on Dower is thus commenced by Mr. Macqueen:—

"The law of primogeniture, by which land, on the father's death, goes exclusively to the eldest son, was qualified, from the earliest times, by allowing a third to the widow for life; not only to support herself, but also for the nurture, maintenance, and education of the younger children. This was called her dower, than

¹ P. 285.

² Pp. 311, 312.

which, in its simple original state, no right known to the law could well be deemed more reasonable and just. It was, in fact, an indispensable social institution, universally adopted under the feudal system; insomuch that dower, or something analogous to it, by whatever name distinguished, was recognised, enforced, and protected in all parts of Europe.

"But however respectable in its origin and useful in its objects, this ancient right became, in process of time, inconvenient; a result in nowise attributable to any inherent property or quality in the thing itself, but brought about, I apprehend, entirely by the unhappy rulings of the judges, who, in former ages, administered the law, and *sometimes made it*."¹

He then explains that "their first great error (the parent of the rest)," consisted in refusing to "admit dower out of trusts or equitable estates;" and that "the next unfortunate miscarriage of the Courts, with respect to dower," was in holding that it attached, notwithstanding that the estate had been acquired by the husband after the marriage, and had subsequently been conveyed by him to a *bonâ fide* purchaser. He next proceeds to banter the conveyancers in the following playful manner:—

"The decision of the Courts so ruling set the conveyancers to work; and these artists devised many ingenious and laudable contrivances to evade or to defeat the injustice of the law. Accordingly we have, among other expedients, the celebrated 'conveyance to uses to bar dower;' which, of all their inventions, was the most happy and successful. It was, indeed, a great triumph of conveyancing, and deserves the praise which the lovers of technical erudition have invariably bestowed upon it."²

Mr. Macqueen's comments on the fourth section of the Dower Act, which enacts, that no widow shall be entitled to dower "out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will," are alike just and vigorous:—

"The effect," says he, "of this clause is, that the widow's dower, on the faith, peradventure, of which she has married, is put under the absolute power of the husband, to sustain, to abridge, to mutilate, or to destroy. No wife, therefore, can be safe under this

¹ Pp. 158, 159.

² Pp. 160, 161.

law, unless she have had a settlement. Whether *that* is a fit rule for an enlightened people to adopt in the most important of all contracts, I leave others to discuss; only observing that if husbands were uniformly wise, just, and generous, the enactment might pass without comment. Looking, however, at the world as it is; remembering that husbands are occasionally apt to be improvident, thoughtless, capricious, — that they sometimes even quarrel with their wives, and upon slender grounds, — that they are not always free from sinister influences, especially in their languishing and dying moments, — and finally, adverting to the great power which the law gives them in other respects over the wife's property and person, — this provision of the act does seem, upon the whole, one of the most unsatisfactory and inexplicable in modern legislation.”¹

We must not here omit to draw attention to the Appendix, in which will be found a highly useful summary of proceedings on alienations by married women; and the value of this chapter to solicitors will be best understood, when we state that it is the first attempt hitherto made to explain the practice under the Fines and Recoveries Act, that Mr. Macqueen has been aided in it by Mr. Millard, of the Acknowledgment Office, and that no less than 6000 acknowledgments are annually taken.

Having now illustrated at some length the sterling merits of this work, we shall be excused if we pause for a moment to point out one or two of its most striking blemishes. And, first, we cannot help thinking that Mr. Macqueen would have acted wisely, had he abstained from the very minute subdivisions in which he has occasionally indulged. Constant breaks in a book are always tiresome to a reader, and generally savour of pedantry in a writer. So far from rendering a subject clear, they almost invariably tend to confuse; and, indeed, in every respect, they furnish the most conclusive proof of a faulty arrangement. Let us take for example the third section of the fifth chapter, only premising that at pp. 188, 215, and 217, other sections will be found of a brevity almost equally ludicrous:—

¹ Pp. 165, 166.

" SECTION III.

" WIDOW'S RIGHT BY SURVIVORSHIP TO HER CHATTELS REAL.

" The widow is entitled to such of her chattels real as are found, at her husband's death, undisposed of by him in his lifetime ; for the husband cannot by will dispose of his wife's chattels real." ¹

These three lines constitute the whole section ; and as the single proposition contained in it had already, at p. 52, been fully developed, it would seem as if Mr. Macqueen, in again referring to the subject, could have had no other object than to remind his readers of the famous " Chapter on Snakes," which, according to Dr. Johnson, adorned a very interesting volume of " Travels in Iceland," and was in these words : —

" CHAPTER CXIV.

" ON SNAKES.

" There are no snakes in Iceland."

Another defect, of no great importance, indeed, but still a defect, consists in the over-abundant use of Johnsonian phraseology. Mr. Macqueen appears to disdain the good old Saxon, in which the Dean of St. Patrick prided himself, and is ever seeking to express what he has to say in bastard latinity. This gives to some few portions of the work a stilted or inflated appearance ; and, if the truth must be spoken, while we frequently laugh *with*, we sometimes indulge in a quiet chuckle *at*, the author. The only other blemish to which we need allude, is an occasional want of entire accuracy. We have praised the work as substantially accurate, and we do not here intend to withdraw or even qualify that commendation ; but, at the same time, a microscopic criticism will discover several passages, where a careless or incorrect expression has been employed, a recent decision or statute omitted, or an erroneous construction put upon a case. For instance, at p. 15, where the author is treating of forfeitures by reason of fraudulent marriages, he thus expresses himself : — " The first inquiry, therefore, in every case must be, whether the parties when they intermarried

¹ P. 152.

were of *lawful* age, and, if not of *lawful* age, whether the requisite consents were obtained." The word "*lawful*," here twice repeated, is clearly inaccurate; since, if the parties were not of *lawful* age, that is, as Mr. Macqueen himself tells us¹, if the male was not fourteen, or the female twelve years old, at the time of the marriage, it would be simply void, and no question of consent could arise. The words intended were "*full age*," or "*of the age of 21*." Again, at p. 124, it is stated, that "*for criminal offences a wife must undergo punishment as if she were sole*;" but this is only true, as a general rule, with respect to such crimes as she shall commit apart from her husband, and gives the go-bye to the whole doctrine of coercion. In the section which treats of the wife's *choses in action*, no mention is made of the "*Companies Clauses' Consolidation Act*," which, in ss. 18, and 19, contains some important provisions respecting the transmission of the shares of a female shareholder on her marriage. At p. 338, the case of *Chambers v. Caulfield*, 6 East, 244, is misinterpreted, and *Weedon v. Timbrell*, 5 T. R. 357, and *Harvey v. Watson*, 7 M. and Gr. 644, are omitted; at p. 289, the author has not correctly stated the effect of *Tugman v. Hopkins*, 4 M. & Gr. 389; and the same observation applies to the case of *Skerrington v. Yates*, 12 M. & W. 855, cited at p. 156.

On the somewhat delicate questions of marital supremacy and the separation of husband and wife, Mr. Macqueen appears to entertain views that would better accord with the sentiments of Ahasuerus than with those of Vashti; for not only does he tell us, that "*harshness in the husband, austerity of temper, rudeness of language, and sallies of passion, are things to be borne by the wife*,"² but afterwards, when he is describing the conflict that subsists between the temporal and ecclesiastical courts on the subject of deeds of separation, and has already shown that the temporal courts, proceeding on considerations of utility and convenience, extend their sanction to voluntary separations, even in cases where neither adultery nor cruelty

¹ P. 12.² P. 88.

appear, he closes his observations with the following passage:—

“No doubt the Church Courts view this matter differently. In those courts a deed of separation, however valid at law and in equity, is no bar to a suit instituted for restitution of conjugal rights. But if, after executing a valid deed of separation, the husband or wife were to resort to this ecclesiastical remedy, Equity would interpose by injunction; otherwise the wheels of the civil and clerical jurisdictions would be locked in each other, and the *business of human life could not go on.*”¹

Our task is now done; but we cannot leave Mr. Macqueen's work without cordially recommending it to the notice of the profession. We are aware that Mr. Bright and Mr. Bell are fellow-labourers in the same vineyard; but with no wish to undervalue the productions of these gentlemen, we feel assured that Mr. Macqueen has no reason to dread, but every reason to court, a comparison of the merits of the three rival publications. As the author of “the Practice of the House of Lords,” Mr. Macqueen's name stands deservedly high, but his reputation as a legal writer will henceforth mainly rest on his treatise respecting “the Rights and Liabilities of Husband and Wife.”

ART. XI. — REVIEWS AND NOTICES OF BOOKS.

I. — *A Practical Treatise on the Laws relating to the Clergy.*
By ARCHIBALD JOHN STEPHENS, Barrister-at-Law. In two volumes. Benning and Co., London.

A KNOWLEDGE of ecclesiastical law, so far at least as its principles are concerned, has now become almost indispensable for every advocate who aspires to eminence in Westminster Hall. Indeed, so much clerical law is interwoven with the common law, that it is difficult, if not impossible, to fix the boundary between many of their most important provinces. Church and state are forensically, as well as constitutionally,

¹ P. 330.

united. The necessity of imbibing much knowledge respecting church temporalities, church dignities, church privileges, and church personages, while mastering the municipal law of the land, has always existed. Every tyro of our Inns of Court, who cons the commentaries of Blackstone, reads per force of Metropolitans, of Peculiars, and of Ordinaries; of excommunications, of banns, of licences, and of divorces; of advowsons, of simony, and of tithes. But for the last two or three years our secular tribunals have rung with the din of controversy on sacerdotal matters to an extent far greater than the average of former times. Nor does there seem any chance of a cessation of this activity in ecclesiastical litigation. On the contrary, it has increased, and is fast increasing, however desirable some may think its diminution. Let us brush up our recollections of what we have heard at Westminster during the last twelve or thirteen terms, and we shall be struck with the manifold mass of business, which the churchmen have provided for our bar, perhaps out of charity for the alleged decrease of business of the ordinary character.

First and foremost there has been the great case of the bishopric of Hereford, which occupied a large slice of Hilary Term, 1848, besides a portion of the extra sittings in Banco. Here we had a controversy respecting the spiritual prerogative of the Sovereign respecting the appointment of a prelate of the Church and of a peer of the realm — a controversy in which the interference of the strong arm of the common law was strenuously invoked — its power to interfere decided; but the policy of its interference in that particular case vehemently asserted and denied on theological as well as forensic grounds. The divided judgments of the Court settled nothing, except so far that the further litigation of Bishop Hampden's case was prevented. We are sure to have the main question brought before our courts again whenever the Crown appoints a bishop from among the extreme partisans of either party in the Church. Nor is this the only dispute touching episcopal personages and Crown rights that has been echoing through the Queen's Bench. There is the still pending litigation between the Queen and the Bishop of Exeter, in Mr. Gorham's case — a case in which the recondite mysteries of

charges of heresy have been mixed up with the almost equally 'recondite mysteries of special pleading; and the Crown's rights to its advowson have been discussed, together with the Crown's rights to reply double in *quare impedit*. In its capacity, also, of a Court of Error in criminal proceedings, our Court of Queen's Bench has lately been called on to determine one of the most serious questions connected with the marriage law, and directly involving the principles and the practice of the ecclesiastical tribunals as to that most important branch of their jurisdiction. This was in the case of the *Queen v. Chadwick*, in which the questions arose, whether marriage with a deceased wife's sister is within the prohibited degrees, and what is the legal meaning of the term "prohibited degrees." On this discussion, Scriptural texts and comments, canonists, civilians, ecclesiastical historians, and foreign as well as native divines were largely quoted and critically examined. Nor has the new Court of Criminal Appeal been a stranger to arguments and discussions, whose native air would seem rather to be the solemn atmosphere of Doctors' Commons. It is but the other day that in the case of the *Queen v. Chapman*¹, on the question whether a false oath before a surrogate respecting a marriage license amounted to the legal crime of perjury. Gibson, Strype, and Sanchez, "*De Sancto Matrimonii Sacramento*," were arrayed as authorities on one side; while on the other side Bayle was brought forward to demolish Sanchez. Then there is the great case of *Burder and Velez*, as to the power of a numerical minority to make a church-rate, which still is winding its slow way along our Courts of Common Law. This church-rate question agitates nearly every borough in the kingdom; and there is hardly a parish in which some lay or clerical tithe-holder is not contesting the amount of poor-rate imposed upon his parsonic property. Numerous other instances might be referred to; but these which we have selected may serve to remind our readers of the increased extent to which our Common-Law Courts are now required to deal with ecclesiastical matters, and of the consequently increased importance to the advocates in those courts that they should be well

¹ Argued on the 2d of June.

acquainted with at least the principal parts of the laws relating to the clergy.

Mr. Stephens's learned and lucid treatise on this subject is admirably calculated for conveying sound general information as to the various departments of Ecclesiastical Law; and it is also a most convenient book of reference on particular topics. The alphabetical arrangement of the subjects is of great advantage in this last respect, and great skill has been shown in grouping each case and statute under its proper head. Mr. Stephens has wisely forbore to cumber his volumes by giving in detail the forms of procedure and mere practical details of the host of the Ecclesiastical Courts. Such matters when specially wanted can be specially learned from the old and voluminous treatises on these tribunals. But he gives the pith of the law on each point; condensing and epitomising where the authorities are second rate, or the topic unimportant, but giving *in extenso* the sections of the statutes and the judgments of the Courts in all matters of greater moment.

We would refer to the articles on "Burial" and on "Baptism" as good specimens of Mr. Stephens's learning and ability. The decisions of the ordinary ecclesiastical tribunals, of the Judicial Committee of the Privy Council, and of the Courts of Common Law, on the numerous and important questions connected with these two topics, will be found excellently arranged; and all the various other sources of information on the rights and duties of clergymen, relatives, parishioners, and others, are fully brought forward and compared. The article also on "Mandamus" is one which every lawyer may peruse with advantage.

Some may suppose that the increase of litigation as to clerical persons and matters, to which we have alluded, is likely to be checked by the interposition of the Legislature. We rather expect a diametrically different result from new law-making on these subjects. Certainly the common lawyers would be roused into fresh employment by such bills as that upon church discipline which the Bishop of London brought into the House of Lords early in the session that is now about to terminate. We believe that the bill made no

further progress this year, but we expect to hear of it again in 1850. One of its provisions is to create a trial by jury (all clergymen) for every clerk who is charged with any minor ecclesiastical offence; while, by another clause, charges of heresy and of a similarly grave character are to be finally determined by a new court, which is always to include among its acting members one of the Equity and two of the Common Law Judges.

II. — *Prynne's Records.*

The recent purchase of the unique volume of Prynne's *Records* by the Society of Lincoln's Inn for the apparently large sum of 335*l.*, at the sale of the Stowe Library, affords a suitable occasion for a few observations in the pages of this Review on the celebrated William Prynne and his writings.

The existence of the volume just acquired by the Society was till a recent period unknown to bibliographers, and there can be no doubt, upon examination, that it is (as the Right Hon. Thomas Grenville has remarked on the fly-leaf of the book) that Introduction described by Prynne in the first volume of his work, as "not yet completed, swelling to an entire tome." The work in question consists of three folio volumes, exclusive of this introductory portion; that which is called the first volume commences with "Book the Second," and the volume now under notice is called "Book the First." It has no title-page, and is unfinished, ending at page 400. with the words: "*coepiscopi tui et coma.*"

Extraordinary as the price given for the volume may appear, the Benchers of Lincoln's Inn have availed themselves of the opportunity of completing the copy of Prynne's remarkable historical work presented by the author himself to their library, and of paying a public tribute of respect to the memory of a member of their bench, whose character has hitherto not been justly appreciated. His memorable speech in the House of Commons in favour of his sovereign, at the hands of whose ministers he had experienced the most unjust and cruel treatment, gives evidence of the magnanimity of

his disposition, and serves to redeem his character from the indiscriminate censures cast upon it by some distinguished men.

It is not surprising that the poet Milton,—the “stern republican,”—should speak slightly of the defender of King Charles I., nor that the author of *Hudibras* should hold the “puritan” in contempt. Neither could it be expected that Bishop Nicolson (the author of the “English Historical Library”) should look with favourable eye on the indefatigable impugner of the prelacy. The dedication of Prynne’s second volume of his “Records” to the Earl of Clarendon affords ample proof that the sentiments of the author of the “History of the Rebellion” had undergone a vast change in his favour. Anthony Wood, whose strong prejudices are well known, is obliged to confess that the works of Prynne are highly useful to the antiquary, as well as to the critic and to the divine. “His activity in public life, and the firmness and intrepidity of his character were as ardent as in his study—his soul was Roman,” are the words of Mr. D’Israeli, who states, further, that King Charles II. bestowed upon him the title of the “Cato of the Age,” and that one of his own party facetiously described him as “William the Conqueror,” a title he had most hardly earned by his inflexible and invincible nature.

His heroism was remarkably exemplified in his unflinching endurance of the tortures inflicted upon him, in his second mutilation and branding, at the conclusion of which he observed, with a smile, “The more I am beaten down, the more I am lifted up.” On his way back to the Tower, after his punishment, he composed the following verses on the two letters branded on his cheeks, S. L. for seditious libeller, but which Prynne interpreted as “Stigmata Laudis,” the stigmas of his persecutor, Archbishop Laud:—

“Stigmata maxillis referens insignia LAUDIS,
Exultans remeo, victima grata Deo.”

The subsequent triumph of this extraordinary man, after his temporary degradation, viewed in contrast with the fate of Archbishop Laud, presents a striking instance of the mutability of fortune; for, about three years afterwards, being

released by an order of the House of Commons from his imprisonment in the island of Jersey, he entered London amidst the acclamations of above ten thousand persons, carrying boughs and flowers in their hands, the path being also strewn with flowers. After the lapse of another three years he was authorised to enter the apartment of the archbishop, then in his turn a prisoner in the Tower, for the purpose of examining his papers. In his conduct towards this prelate, Prynne was not animated by the same generous spirit which he afterwards manifested towards his sovereign when in the power of his enemies.

As the real nature and contents of the laborious work which has given rise to the preceding observations seem to be not sufficiently known to the profession or to the public generally, either on account of the scarcity of the first and second volumes, or owing to prejudices entertained against the author, a brief notice of their contents taken from the title-pages, dedications, and prefatory epistles may be acceptable to the reader.

The indefatigable industry of the author in the investigation of innumerable documents, many of which have since perished, has been found of great use to the practical lawyer, in cases involving questions of ecclesiastical jurisdiction, by the direct references to, and numerous transcripts of, original records which the work contains.¹

Vol. I. Title-page: — “The first tome of an exact Chronological Vindication and Historical Demonstration of our British, Roman, Saxon, Danish, Norman, English Kings’ supreme Ecclesiastical Jurisdiction in and over all Spiritual Affairs, Causes, Persons, as well as Temporal, within their Realms of England, Scotland, Ireland, and other Dominions; from the original planting, embracing of Christian Religion therein, and Reign of Lucius, our first Christian King, till the death of King Richard I. A. D. 1199. Wherein, &c. &c.

¹ The writer who could quote a hundred authors, on so unpromising a subject as “The Unloveliness of Love-locks,” and ten times that number — a host or “squadron of authorities” (to use his own words) — in his wonderful “*Histriomastix*,” is undoubtedly of great value, as affording materials to aid the researches of the inquiring student.

By William Prynne, Esq., a Bencher and Reader of the Honourable Society of Lincoln's Inn. London: printed for the Author, by Thomas Ratcliff, 1666."

This volume is dedicated to King Charles II., and in this dedication the author states, that none of our historians or lawyers having yet collected any complete chronological history, especially out of our ancient records, of the acts and proceedings of our sovereigns in resisting the papal and prelatial encroachments on their jurisdiction, he had been engaged, by the encouragement of his Majesty and some honourable Lords, in this "Herculean task;" and that he had already completed two large folio volumes at the press, and collected sundry materials for those yet uncompleted.

In the "Epistle to the Readers, especially of the Long-Robe," the author says, "I here present you with the First Tome (though not First Book, by way of introduction to the whole work, reserved till last) of an exact Chronological Vindication," &c., and that for the information and benefit of students and professors of the Common Law, he has transcribed sundry ancient laws and charters of our Christian kings, evidencing their sovereign prerogative over all ecclesiastical affairs and persons, as exemplified in the *Charte Antiqua* and other Rolls in the Tower of London; all other their records and writs before King John relating to their ecclesiastical or civil government being long since perished, except some transcripts of them extant in old leiger-books belonging to monasteries, or historians already printed. "Upon which account this First Tome consists for the most part of historical and other collections, and some few charters of our kings not formerly printed; whereas all succeeding it (especially the third, fourth, and fifth,) will be almost wholly made up of useful, pertinent, rare records, not hitherto published, unknown to most antiquarians and lawyers."

At the end of this volume is an advertisement to the reader, in which the author states, that "in the late dreadful Fire of London, while he was endeavouring to excite others to extinguish the flames, and to preserve the public records of the king and kingdom from their fury, his printer's house¹,

¹ Situated near Doctors' Commons.

with most of the printed copies of this Tome (then fully finished at the press, except the intended tables to it); as likewise of the second tome, formerly published, and of the *First Book*, and third tome (wherein he had made some progress), were there burnt, together with it; not above seventy of them being rescued from the fire."

Vol. II. Title-page:—"The second tome of an exact Chronological Vindication and Historical Demonstration of our British, Roman, Saxon, Danish, Norman, English Kings' supreme Ecclesiastical Jurisdiction over all Prelates, Persons, Causes, within their Kingdoms and Dominions, from the first year of the Reign of King John, A. D. 1199, till the Death of King Henry III. in the year 1273. Wherein the several branches of our Kings' Ecclesiastical Sovereignty are truly stated, &c. &c.; and the principal Transactions of State between these Kings and the Court of Rome are impartially related, out of the best historians in or next that age, and irrefragable rare Records in the Tower, not formerly published. By William Prynne, Esq., &c. London: printed for the Author, by Thomas Ratcliff, 1665."

This volume is dedicated to Edward, Earl of Clarendon; from "whose unexpected voluntary motion and subsequent encouragements," says the author, the work "received its original conception, augmentation, and production."

In the dedication, he further observes, that he has prefaced this tome (brought forth into the world, like Pharez, before its elder brother) with a brief, necessary, Introduction, to supply the want of his larger Introduction, comprised in the first book of the first tome [the volume just purchased by the Society of Lincoln's Inn], not yet completed, over large, to be annexed to this, as he at first designed.

"This tome," it is stated "(as those intended to succeed it), principally consists of memorable records (preserved in the Tower of London) not formerly published, intermixed with observable historical passages taken, for the most part, out of our best and most ancient historians of the Romish religion, writing in, or nearest to, the reigns of John and Henry III." All the records herein transcribed the author perused with his own eyes, and carefully examined by the originals, "which

are of so venerable, irrefragable authority (being carefully enrolled in the respective years they bear date, by sworn clerks, without any rasure, alteration, diminution, and so remaining till this present), that no person, by our Common Laws, may or ought to aver against them. By their verdict," he says, "he has not only corrected some mistakes, ratified and illustrated sundry obscure, dubious passages in our historians, chronologers, and in King John's printed charter, but also supplied many observable defects, omitted or pretermitted bulls, letters, patents, writs, records, transactions relating to the ecclesiastical supremacy of our kings, &c., not extant in, nor remembered by, any histories or law books whatsoever."

In the epistle to the readers, the author gives his reasons for publishing this second volume before the first, stating that in his primitive undertaking of this subject he designed it to be the first, beginning his collections from the first year of King John, when the charter, clause, fine, liberate, and patent rolls in the Tower begin; but afterwards, upon second thoughts, mounting his chronological collections, in relation to the kings of our isle, as high as the first preaching of the Gospel therein, and to Lucius, our first Christian king, and deducing them down to King John, in a more copious manner than he originally intended (a work of much pains, search, study, and difficulty, swelling to another large folio volume); and his chronological introduction to it, from Adam till Christ's ascension into heaven, and from thence, in relation to the Roman, Greek, and German emperors, and other Christian kings in foreign parts, till our modern age, amounting to another volume, and requiring a larger proportion of time than he could yet promise to himself, he was thereupon induced to propose this second tome, in point of publication, before the first, lest death or sickness should deprive posterity of both.

The author then states the uses and benefits of his work to our kings, their officers of state, prelates, divines, judges, lawyers, and the nobility and gentry of both kingdoms, and asserts that all judges, practisers, and students of the common laws in England and Ireland, may here peruse some memo-

rable resolutions and records concerning points of law ; many writs, prohibitions, patents, and other records not formerly published (for the most part hitherto unknown), against the usurpations of the popes and Romish clergy.

Vol. III. Title-page: — “ The History of King John, King Henry III., and the most illustrious King Edward I. ; wherein the ancient sovereign dominion of the kings of England, Scotland, France, and Ireland, over all persons in all causes, is asserted and vindicated against all encroachments and innovations whatsoever. The mistakes in some printed statutes, canonists, law books, histories, and other matters of moment, are rectified and rescued from oblivion. Collected out of the ancient records in the Tower of London, and now published for the better advancement of learning, maintenance of the King’s supremacy, the subjects’ liberties, and the law of the realm, &c. By William Prynne, Esq., a late Bencher, and Reader of Lincoln’s Inn, and Keeper of his Majesty’s Records in the Tower of London ; and finished a little before his death. London : Printed by Tho. Ratcliff, 1670.”¹

This volume begins with a dedicatory epistle by the author to Arthur Earl of Anglesey ; Sir Harbottle Grimston, Bart., Master of the Rolls ; Sir Matthew Hale, Knt., Chief Baron of the Court of Exchequer ; Sir Edward Atkins, Knt., one of the Barons of that Court ; Sir Wadham Windham, Knt., one of his Majesty’s Justices of the King’s Bench ; Sir Richard Rainsford, Knt., a Baron of the Court of Exchequer ;

¹ Some copies of this volume have the title-page in Latin, with the date two years later, as follows : — “ *Antiquæ Constitutiones Regni Angliæ, sub Regibus Joanne, Henrico Tertio, et Edoardo Primo, circa Jurisdictionem et Potestatem Ecclesiasticam. Ex Archivis Regiis in Turri Londinensi fideliter Collectæ. Per GUL. PRYNNE, eorundem Archivorum Custodem. Londini, impensis Authoris, MDCLXXII.*”

The title-page is followed by a brief address, in Latin, to the reader, lamenting the interruption of the work by the death of the author, in these words : —

“ *Ad Lectorem. Authori ante Obitum in institutis erat, Antiquas hasce Regni Angliæ Constitutiones, Jurisdictionem Ecclesiasticam spectantes, multo Auctiores emisisse ; eas autem præcipue, quæ apud Doctiss. Spelmanum [in Conciliis Ecclesiæ Anglicanæ] desiderantur, in lucem asseruisse. Hæc vero, in tuum (Lector) Emolumentum, meditant, mors obrepsit ; adeoque Opus, non sine magno Gentis literariæ dispendio, intercidit.*”

Sir Robert Atkins, Knight of the Bath, Solicitor-General to the Queen's Majesty; and the rest of the worshipful Readers of the Hon. Society of Lincoln's Inn, his ever-honoured kind Friends and Fellow-Readers of that Society.

The dedication, dated from his study in Lincoln's Inn, July 25. 1668, commences with these words:—"My common relation to you all in general, as the eminentest Members of the famous Society of Lincoln's Inn (a fruitful mother for sundry ages of many able, learned, reverend, renowned privy counsellors, state officers, judges, justices, barons in all courts of law or equity, both in England and Ireland, as well as of eminent serjeants, readers, barristers, and students of the laws of England), and my particular obligations to each of you as my highly-honoured cordial friends, have engaged me (in point of duty and gratitude) to dedicate to your eminencies this Third Tome of an Exact Chronological Vindication and Historical Demonstration of the Supreme Ecclesiastical Jurisdiction of our British Kings, &c; more particularly during the reigns of King John and Henry the Third (by way of Appendix to my Second Tome); but principally of our glorious King Edward the First (the chief subject matter of this volume), and emboldened me to publish it to the world under the shelter of your venerable names and patronage."

The author then proceeds to state that this volume consists of such records, writs, prohibitions, &c., as are proper for the respective cognizance of the said patrons, which will add much light, lustre, and some considerable supplements to our ancient treatises of the Common Law, the broken cases in Fitzherbert's Abridgment, and proceedings in our courts of justice; and that in his researches he has rescued from putrefaction, as well as from oblivion, many of our "over-much neglected records." He also mentions again, that in the Great Fire of London, his printer's house, with all his printing presses, and most of his cases, letters, and of the printed copies of his first and second, with forty printed sheets of this third tome, were consumed.

It was doubtless the intention of the author that this volume should have borne the same title as the others, as appears from the dedicatory epistle; but his death occurring

just before the publication, his executors, or those who were concerned therein, substituted as a title "The History of King John," &c., in hopes (as has been suggested by Bishop Nicolson) that, appearing in the shape of a new work, it would the more readily find purchasers.

Vol. IV. [so called, but more properly Vol. I.] This volume consists of the Introduction before mentioned, and was designed, as stated by the author, in the Epistle to the Readers prefixed to the second volume, to embrace the period extending "from Adam till Christ's ascension into heaven; and from thence, in relation to the Roman, Greek, and German emperors, and other Christian kings, in foreign parts, till our modern age." It was never published, is unfinished, and is without title-page, but has the same head-line over the pages as the other volumes, viz., "An Exact History of Pope's intolerable Usurpations upon the Liberties of the Kings and Subjects of England and Ireland." The first four chapters, comprising eighty pages, are occupied with arguments maintaining that the supreme ecclesiastical power and jurisdiction over all persons and causes resides, by divine ordinance, in the civil magistrate, the ministerial or priestly office only belonging to the clergy. The fifth chapter contains a history of the gradual encroachments of the prelacy from the origin of the papal power till about the middle of the twelfth century, where the volume terminates unfinished.

Copies of the three volumes have been several times sold by public auction for upwards of a hundred pounds. The copy in the Stowe Library, sold separately from the fourth, or introductory volume, produced 140*l*. It is supposed that not more than twenty-five sets of the three volumes exist, most of the printed copies of the first volume, and a great number of the second, together with this introduction, having perished in the Great Fire of London. It is worthy of remark that this loss occurred to the author, whilst he himself was occupied in endeavouring to rescue *the public records of the kingdom from destruction*. Dr. Dibdin has observed, that as seventy copies of the first volume were preserved, there is every reason to conclude that there are at least fifty perfect copies of Prynne's Records yet in existence; but an attentive

perusal of the author's statement will rather lead to the inference that about seventy *volumes* only — not seventy copies of *each* volume — were rescued from the flames.

With respect to the introductory volume now in the possession of the Society of Lincoln's Inn, and regarded as unique, it seems probable either that this copy was reserved in the author's own hands for his use during the progress of the work through the press; or that, if any other copies escaped destruction, not having been issued to the public, they have since perished, from the circumstance of their being unfinished, and having no title-page, and having consequently been regarded as an imperfect work, and of no value, by persons into whose hands they may have fallen.

NOTE (A.) TO ART. VII.

SINCE this article was printed a bill has been brought in by the Solicitor-General to remedy one of the most prominent grievances to which we have alluded — the law relating to Judgments; and the statute book of this session will show many other acts, all having for their object the emancipation of the soil from legal technicalities and difficulties: and we quite agree with Sir John Romilly that it is not by one, but by a series of measures, carefully considered and deliberately proceeded with, that this great object is to be accomplished. That the desire to obtain it is extensively diffused throughout the country appears, among other proofs, from an address of the Society of Friends, dated May 8. 1849.

"We have long felt that the chief ground of hope, the main source of improvement, is the improved cultivation of the soil; and the surest means of effecting this object is by affording security to the cultivator. That security does not generally exist in Ireland is admitted. On this point there is scarcely a second opinion among thinking men in this country. The laws which regulate the title to and the conveyance of land require to be changed, so as to give the utmost freedom to its sale and transfer, so as to pass those estates whose proprietors are irretrievably ruined into other hands, and to enable those who are partially encumbered to free themselves from their difficulties by disposing of part of their landed property. Until this be effected — until the soil of Ireland be held by a clear and marketable title — until the owners be enabled to sell the whole or any part of their property without the ruinous delays and the heavy costs which now prevent them — until the creditors of landowners have those facilities for enforcing payment of their debts by the sale of their property, to which justice entitles them — we are convinced, and we feel ourselves bound thus publicly to state our conviction, that it is in vain to hope that Ireland can raise itself from a state of poverty and degradation." — *Address of Relief Association of Society of Friends, 8th of fifth Month, 1848.*

**SOCIETY FOR PROMOTING THE AMENDMENT
OF THE LAW.****THE SIXTH ANNUAL REPORT OF THE COUNCIL.**

It is now the duty of the Council to present their Sixth Report on the state and prospects of the Society.

The real power and success of an institution of this nature must be looked for in the spread of the opinions and doctrines which it avows, and the influence which it exercises, not only among its own members, but with the Legislature and other public bodies, and in society in general. Judged by this test, the Council may with truth congratulate the members and the public at large on the important station which the Society for the Amendment of the Law now holds. It may safely be asserted that at no former period of our history was the desire to amend the law so universal, and the duty to endeavour to amend it as well on the part of the state as of individuals so fully admitted. But if this general feeling did not take some specific direction, it would be of little use; and a brief examination will show that it is precisely in those portions of the subject to which the Society has chiefly devoted its labours that most progress has been made in the past year.

The Reform of the Court of Chancery, and the Free Transfer of Real Property, are the two great points to which the Society has directed its attention, and as to which it has spared no pains, by means of its committees, not only to propose specific plans of amendment, but to show how cumbrous and expensive are the present procedures connected with this Court and with the transfer of land.

The Council have the satisfaction of observing that the efforts of the Society have not been without fruit; and it is in this present session of Parliament in which this has been most apparent. The Court of Chancery has, in the sister

kingdom of Ireland, been admitted almost universally to be incompetent to deal satisfactorily with one important branch of its business — incumbered estates; and to this extent it has been practically superseded by a bill which has passed the House of Commons, and has been read a second time in the House of Lords, and referred to a select committee. All parties have demanded a machinery less expensive and complicated, and adapted to meet the wants of the parties without absorbing the property in dispute. This must be taken as a significant warning not only to this Court in Ireland, so far as the remaining branches of its jurisdiction are concerned, but to the sister institution in this country. It is, indeed, so far satisfactory to know, that some great alteration in the procedure of the Court of Chancery is now universally demanded by all branches of the profession, and more especially by the solicitors, as absolutely necessary for conducting the business of their clients effectually and satisfactorily.

The important object for which this new tribunal is to be established in Ireland has been one which the Society has also endeavoured to promote by every means in its power, — the free transfer of land. The Council have seen with no little satisfaction, that the principles which have been laid down in the Reports of their Committee on the Law of Property have made great progress. Not only has their truth been universally admitted, but also the great benefit likely to result from their being acted on in practice, in raising the value of land, and benefiting all classes of the community. The Council need only notice as proof of this, the reception which the bill to facilitate the transfer of land (which proposes the establishment of a general register of titles) has met with in the House of Commons in the present Session of Parliament. Without any particular reference to the details of this measure, it is only necessary to observe, that all former bills having this object have been thrown out by large majorities; while the principle of this Bill has at length met with general assent, to which your Council are glad to perceive several respectable Provincial Societies composed exclusively of attorneys are not exceptions. If this expression of opinion be contrasted with that manifested when the General Regis-

ter Bill was last before Parliament, it will be admitted that there is a remarkable change of opinion with respect to registration, more especially among the landed gentry, who are chiefly interested in the question. In the same spirit several other bills, all having for their object the free transfer of land, as the Bill for the Compulsory Enfranchisement of Copyholds, and the Bill for dealing with Renewable Leaseholds in Ireland (among others), have been well received in both Houses of Parliament, who have affirmed this principle by large majorities. Indeed, it may be truly said that there was never a parliament better disposed than the present to grant sound and well-advised amendments of the Law.

The Council do not wish to claim for the Society the entire merit of this improved feeling; but, considering that for the last five years its labours have been principally devoted to diffusing sound opinions on these subjects,—that these opinions have not only been largely circulated by its own publications, but generally by means of the press throughout the country,—and that no opportunity has been lost of promoting in Parliament bills and inquiries founded on its reports, the Council, under all these circumstances, think it is only necessary to state these facts, and allow the public to draw their own conclusions as to the effect of the proceedings of the Society. As, perhaps, a more complete proof of the use made of the suggestions of the Society, the Council may refer to another bill which has also passed the House of Commons, and been read a second time in the House of Lords,—as to the Law of Landlord and Tenant, chiefly relating to what has in some parts of England been called “Tenant Right.” On this difficult subject the House of Commons seem very much to have adopted the conclusions of the Committee of the Society, which made a report on that subject, not only as to what could properly be the subject of legislation, but also as to what could not.

In the address presented to the public at the meeting held in this room last year, the Council found it necessary, in alluding to the state of the Law of Debtor and Creditor, to observe that, notwithstanding the anxious labours which had theretofore been expended on this important subject by some of the most eminent members of the Legislature, the state of

that law "yet remained uncertain and insufficient." It is now, however, the pleasing duty of the Council to state that there is pending in Parliament a bill for amending the Law of Bankruptcy, which has passed the House of Lords and has been sent down to the House of Commons, which is understood to afford much satisfaction to the mercantile part of the community. For this important and elaborate measure we are mainly indebted to the anxious and unceasing exertions of the noble President of this Society.

It is now proposed to notice some other matters which have engaged the attention of the Society. The report noticed in the last address of the Council, on the Law of Divorce, was duly received by the Society; but it is to be regretted that no step has been taken as to that subject in Parliament.

A report from the Common Law Committee on admitting the evidence of parties to actions, has also been presented and received by the Society, and a bill has been introduced in the present Session into the House of Lords to amend the Law of Evidence, containing, amongst others, provisions for effecting this object.

The law relating to the treatment of Lunatics was the subject of much discussion, not only in the Committee to which it was referred, but in the Society at large; and although the report called forth some opposition, yet it was at length unanimously adopted both by the Committee and the Society; and your Council have reason to think that its recommendations are approved of by those best acquainted with the subject, and will in time be adopted.

The subject of Limited Liability in Partnership, known in France as partnership *en commandite*, has also engaged the attention of a Special Committee composed as well of commercial as legal members. It is proper to state that, both in the Committee and in the Society at large, great difference of opinion prevails on the subject, although resolutions in favour of an alteration of the existing rule of English Law in this respect were carried by a small majority.

The other subjects which have principally engaged the attention of the Society are the Reform of the Master's

Office,—on which subject a set of orders has been submitted by a Committee to the Society; and the present mode of reporting the decisions of the Courts of Law and Equity, and of Legal Publications, which is still under the consideration of the Society.

The Council have watched, with great interest, the progress and operation of the County Courts, as affording evidence of the benefit to the community of a cheap and simple procedure. They have very recently referred to one of the Committees an inquiry as to what points the jurisdiction of these Courts may be beneficially extended,—a subject of very great importance.

This brief notice of what has been done since the last Report is sufficient to show that the present year has not been an idle one. The Council lament that the cause of Legal Education has made so little progress, which they are unwilling to attribute to the remissness of the rulers of the Inns of Court—its proper foster-fathers; and they look forward, as the proper remedy for this and other defects in the judicial institutions of the country, to the establishment of a Law University, and the institution of a Minister of Justice.

The Council have, in conclusion, to observe, that it is of great importance that as many members as possible should take part in the proceedings of the Society, and that the labour should not be thrown on a few. They have also to remind members that although hitherto its funds, by careful management, have been adequate to meet all demands, yet that, if larger funds were placed at their disposal, more good might be done; and they confidently remind the public that, with their present limited means, much has been accomplished. They earnestly, therefore, impress on their fellow members, and all others interested in this important subject, that they should exert themselves in extending a knowledge of the Society, in procuring new members, and, generally, in furthering the great cause of the Amendment of the Law.

POSTSCRIPT.

THIS Number closes the Fifth Year and the Tenth Volume of our labours, and we may be permitted to say we never felt so much confidence in the truth of the cause which we more especially advocate, or in the benefits which must attend its prosecution. Great and constant as have been the amendments which have been made in the law within these years and their immediate predecessors, we are satisfied they must be followed by many others of a more extensive nature. We must have in this country a simple and intelligible body of law, administered for the benefit of all classes by a simple and intelligible procedure. This is one of the first, if not the very first, and most important problems, the working out of which is required by the present times, and we have no doubt of its being accomplished, because the profession of the Law is now itself demanding it, and directing its attention to it as necessary to its own interests—nay, its preservation. He who can help forward this movement is the best friend, not only of the public, but of the lawyer; and it is our greatest satisfaction, in the prosecution of this cause, to find that this is now the opinion of all with whom we converse.

The following return as to the Masters' Office has been ordered on the motion of Mr. Wood:—Return by the Masters of the High Court of Chancery of all causes or other matters pending in their respective offices on 30th of June, 1849, and of the proceedings had therein, stating the following particulars in a tabular form:—

Name of Cause or other Matter.	Date of Order of Reference, or (when no such Order) of the First Application to the Master.	Total Number of Warrants taken out in each Cause or Matter, distinguishing how many were attended by Counsel, and how many were for more than one hour.	Date of the first and of the last Warrant in each Cause or Matter.	Observations.

This return, if it does no more, will seal the fate of hourly warrants; and we rejoice that this matter is in Mr. Wood's hands. Mr. George Turner has also given notice that in the next session he will bring the subject of Chancery Reform before the House of Commons.

The bill for introducing the compulsory principle into the dealing with copyhold land, after having been read a second time by a large majority, was thrown out in committee. It gave a power to a single tenant to compel the lord to enfranchise, but it did not allow the lord a similar power. This was not in accordance with the principle which we have already indicated the proper one,

by which either party might enforce an enfranchisement (9 L. R. 307.); and it is to be observed, that all the members who opposed the bill, on both sides of the House, agreed that the copyhold tenure should be abolished, although they objected to the details of Mr. Aglionby's bill. This appears, not only from the debate when the bill was lost, but also from a subsequent conversation on July 24, which took place respecting it, with reference to a bill on a similar subject, which has since passed—the bill relating to renewable leaseholds in Ireland. The Solicitor-General said: "It was not correct that the Copyhold Enfranchisement Bill was thrown out on the principle. It was rejected because the details of the bill were not found to be in harmony with the principle."

And Sir James Graham said, "that the bill before the House was open to the same objection which had been taken to the Copyhold Enfranchisement Bill, and on account of which it was rejected, namely, that it was a unilateral measure. It gave power to the tenant to compel the reversioner to enfranchise the property, but it did not empower the reversioner to compel the tenant to convert his estate into a freehold of inheritance. *He considered that the principle on which they ought to proceed was to make the measure compulsory on both sides.*" We do not doubt, therefore, after so general a concurrence of opinion in a wider application of the compulsory principle, that in the next session a bill having a broader basis will be introduced, which, we anticipate, will meet with very little opposition.

We are glad to perceive that the law relating to the treatment of Lunatics is attracting attention in several quarters. We shall very shortly again address ourselves to this subject. In the meantime every fresh day's experience satisfies us of the value and importance of the suggestions contained in the Report of the Law Amendment Society on this subject (printed 9 L. R., p. 313.), to which we direct the attention of all persons interested in the subject.

The cause of the Consolidation, perhaps the Codification, of the Law has made great progress in the present session. The Bankrupt Law Consolidation Bill, to which we have repeatedly alluded, is now safe; and a useful bill, consolidating the law relating to Trustees (with many improvements), has been brought in by Mr. Headlam, and has passed the House of Commons, and may, we trust, become law this session.

July 27. 1849.

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ADDENDUM

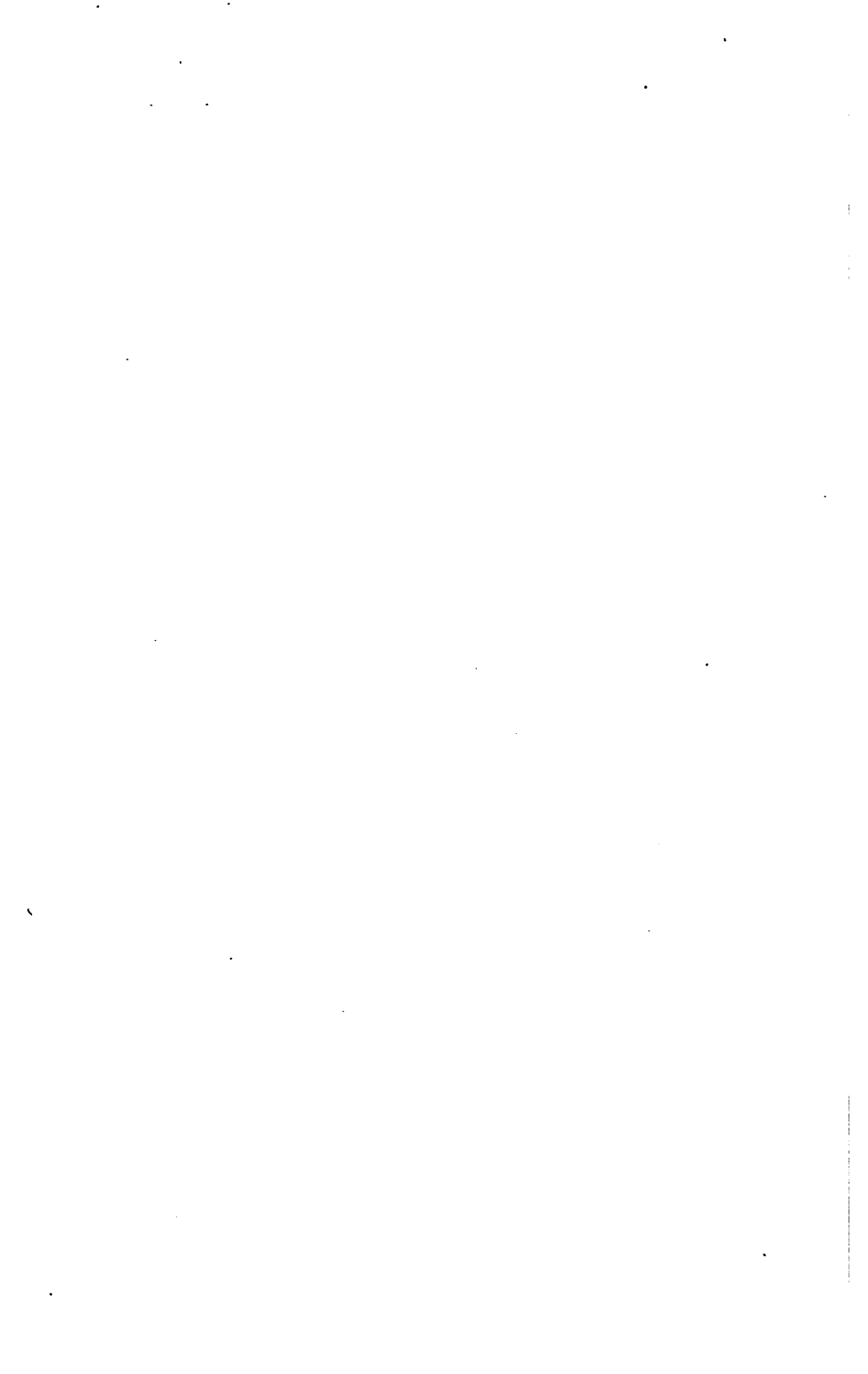
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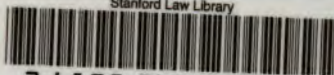
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